BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

ACCELERATING WIRELESS BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT	))))	WT Docket No. 17-79
ACCELERATING WIRELINE BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT	))))	WC Docket No. 17-84

REPLY COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

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July 17, 2017

SUMMARY OF REPLY COMMENTS OF THE SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

The Smart Communities and Special Districts Coalition ("Smart Communities") is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia. Smart Communities filed separate initial comments in each of the above-captioned proceedings. In these reply comments we respond to issues raised in both proceedings in a single filing submitted in both dockets as several of the comments to which we respond were filed verbatim in both dockets.

We begin by addressing our perspective on the lack of need for new federal rules or rulemakings, and articulates Smart Communities' vision for how industry and regulators can most effectively move forward together to address the challenges and fulfill the promise of next generation wireless and wireline infrastructure. The record in these dockets reflects an industry response that is brimming with demands for federal action but woefully low on evidence of need or sound legal reasoning. Although local government filings in the *Mobilitie* docket included expert reports and the infrastructure Notices of Inquiry ("NOIs") and Notices of Proposed Rulemaking ("NPRMs") issued in these proceedings called for specificity, the industry comments did not include expert rebuttal and provided very few specific factual examples of problems claimed (but many unsupported claims to which it is impossible to respond). The Coalition's unrefuted expert reports show, among other things, that:

- Small cells can have significant impacts on safety and on property values, because small cells are not necessarily small;
- While many localities are making significant efforts to accommodate small cells, the applications are often not properly prepared, sometimes lacking even basic engineering analysis, and therefore require multiple submissions and resubmissions;

- There is a significant expense associated with reviewing the applications that needs to be recovered;

- Allowing localities to recover costs and obtain fair market value for property (including public rights-of-way) used will actually enhance deployment, and ensure that advanced systems are deployed in a rational way;

- There is no reason to suppose charging less than market rates for public property or public rights-of-way will lead to deployment of 5G or advanced systems in a rational way.

The implications should be obvious – the record does not support further Commission action espoused by industry.

By that we do not mean to say there is no work to be done to prepare for the next generation of deployments. To the contrary, Smart Communities recognize new types of deployments raise novel issues related to safety, aesthetics, permitting and related matters, but we believe that a cooperative approach that recognizes state and local roles is a far more sensible way to resolve these issues, as opposed to what would inevitably be a heavily litigated and expensive federally mandated regulatory process. We are working on these issues and welcome further opportunities to participate in collaborative processes with industry that recognize and respect the unique roles of federal, state, and local governments in the regulation of wireless and wireline infrastructure.

We then reply to comments filed in the Wireless NPRM, particularly those addressing the proposed "deemed granted" remedy for the Section 332 shot clocks, modifications to shot clocks, and moratoria. No legal arguments raised by commenters who urge the Commission to change course and adopt a deemed granted remedy rest on sound principles. The Commission should reaffirm its prior rulings in this regard. The industry's predictable calls for shorter shot clocks and other modifications should also be rejected as they are not supported by convincing legal or factual bases for action, and ignore that the legal focus of the statute is on what is a

"reasonable time" for completing the necessary regulatory action, not on an industry desire for speed to market. For actual, legal moratoria, the existing Commission's rules are clear that moratoria do not stop the shot clocks and the record does not support a need for further action.

Finally, Smart Communities address industry comments raising myriad issues in response to the two infrastructure NOIs – specifically Part III of the Wireless NOI, and Part III.A of the Wireline NOI which also address various legal issues related to the scope of Communications Act provisions such as Sections 224, 253, and 332(c)(7). Industry comments in response to these NOIs read like wish lists. There are broad calls for preemption of local government authority to address issues from aesthetics to permits fees to undergrounding, calls for imposing new federal regulatory regimes on public rights-of-way and publicly-owned infrastructure such as utility poles and street lights, calls to overturn well-established court precedent, and the like. These demands for action are unacompanied by a demonstration of meaningful harms or actual prohibitions or barriers to deployment. They lack sound legal support, and invite the Commission to violate basic Constitutional principles. Providers may not like that the law guarantees states and local governments a role in the deployment of wireline and wireless facilities, but that alone does not entitle them to federal preemptive action. In sum, industry filings and the record are devoid of solid legal or factual foundations for any declaratory rulings, rulemakings or even further exploratory proceedings. The Commission should not engage in further regulatory proceedings on the topics in the NOIs. It would be arbitrary, capricious, and counter-productive to impose additional federal regulations – there is no reason to suppose any legitimate interest would be advanced, and federal preemption is not supported.

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REPLY COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

I. INTRODUCTION

The Smart Communities and Special Districts Coalition ("Smart Communities") is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia.[1]

[1] The Smart Communities and Special Districts Coalition is comprised of the following members:

Individual members: Ann Arbor, MI; Atlanta, GA; Boston, MA; Cary, NC; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Montgomery County, MD; Myrtle Beach, SC; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Portland, OR; Rye, NY; Santa Clara, CA; Santa Margarita Water District (CA); Sweetwater Authority (CA); Valley Center Municipal Water District (CA); and Yuma, AZ.

Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses on protection of their citizens' governance and control over public rights-of-way. The Michigan Townships Association ("MTA") promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position. The Michigan Municipal League ("MML") is a non-profit Michigan

II. SUMMARY

Smart Communities filed separate initial comments in each of the above-captioned proceedings.[2] In these reply comments we respond to issues raised in both proceedings in a single filing submitted in both dockets, as several of the comments to which we respond were filed verbatim in both dockets.[3]

We begin by addressing our perspective on the lack of need for new federal rules or rulemakings, and articulates Smart Communities' vision for how industry and regulators can most effectively move forward together to address the challenges and fulfill the promise of next generation wireless and wireline infrastructure. The record in these dockets reflects an industry response that is brimming with demands for federal action but woefully low on evidence of need or sound legal reasoning. Although local government filings in the *Mobilitie* docket included expert reports and the infrastructure Notices of Inquiry ("NOIs") and Notices of Proposed Rulemaking ("NPRMs") issued in these proceedings called for specificity, the industry comments did not include expert rebuttal and provided very few specific factual examples of problems claimed (but many unsupported claims to which it is impossible to respond). The

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corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan local governments, of which 478 are members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent MML member local governments in litigation of statewide significance.

The Kitch Firm represents PROTEC, MML, MTA and Public Corporation Law Section of the State Bar of Michigan. Best Best & Krieger represents the others in the Smart Communities coalition.

[2] Comments of Smart Communities and Special Districts Coalition, WC Docket No. 17-84 (Jun. 15, 2017) ("Smart Communities Wireline Comments"); Comments of Smart Communities and Special Districts Coalition, WT Docket No. 17-79 (Jun. 15, 2017) ("Smart Communities Wireless Comments").

[3] In addition to the issues discussed below, the Commission has proposed a wholesale reversal of network change notification requirements to consumer, safeguards that were adopted in the 2015 Technology Transitions order. While Smart Communities supports the important transition to IP-based networks, such change should not come at the expense of important functions served by local government, nor at the expense of local businesses and residents who make up the constituencies Smart Communities represent. Our constituents, corporate, institutional, and individual, rely on a robust and reliable telecommunications network, and network changes and copper retirement notifications play a critical role in preserving the stability of that network. Smart Communities opposes the Commission's proposal to abandon these rules, and echoes the arguments made in defense of the 2015 Tech Transitions Order proffered by Public Knowledge and others. *See, e.g.* Comments of Public Knowledge, WC Docket No. 17-84 (Jun. 15, 2017) ("Public Knowledge Comments").

Coalition's unrefuted expert reports show, among other things, that:

- Small cells can have significant impacts on safety and on property values, because small cells are not necessarily small;
- While many localities are making significant efforts to accommodate small cells, the applications are often not properly prepared, sometimes lacking even basic engineering analysis, and therefore require multiple submissions and resubmissions;
- There is a significant expense associated with reviewing the applications that needs to be recovered;
- Allowing localities to recover costs and obtain fair market value for property (including public rights-of-way) used will actually enhance deployment, and ensure that advanced systems are deployed in a rational way;
- There is no reason to suppose charging less than market rates for public property or public rights-of-way will lead to deployment of 5G or advanced systems in a rational way.

The implications should be obvious – the record does not support further Commission action espoused by industry.

By that we do not mean to say there is no work to be done to prepare for the next generation of deployments. To the contrary, Smart Communities recognize new types of deployments raise novel issues related to safety, aesthetics, permitting and related matters, but we believe that a cooperative approach that recognizes state and local roles is a far more sensible way to resolve these issues, as opposed to what would inevitably be a heavily litigated and expensive federally mandated regulatory process. We are working on these issues and welcome further opportunities to participate in collaborative processes with industry that recognize and respect the unique roles of federal, state, and local governments in the regulation of wireless and wireline infrastructure.

Section IV of this filing replies to comments filed in the Wireless NPRM, particularly those addressing the proposed "deemed granted" remedy for the Section 332 shot clocks,

modifications to shot clocks, and moratoria. No legal arguments raised by commenters who urge the Commission to change course and adopt a deemed granted remedy rest on sound principles. The Commission should reaffirm its prior rulings in this regard. The industry's predictable calls for shorter shot clocks and other modifications should also be rejected as they are unsupported by convincing legal or factual bases for action, and ignore that the legal focus of the statute is on what is a "reasonable time" for completing the necessary regulatory action, not on an industry desire for speed to market. For actual, legal moratoria, the existing Commission's rules are clear that moratoria do not stop the shot clocks and the record does not support a need for further action.

Section V addresses industry comments raising myriad issues in response to the two infrastructure NOIs – specifically Part III of the Wireless NOI, and Part III.A of the Wireline NOI which also address various legal issues related to the scope of Communications Act provisions such as Sections 224, 253, and 332(c)(7). Industry comments in response to these NOIs read like wish lists. There are broad calls for preemption of local government authority to address issues from aesthetics to permits fees to undergrounding, calls for imposing new federal regulatory regimes on public rights-of-way and publicly-owned infrastructure such as utility poles and street lights, calls to overturn well-established court precedent, and the like. These demands for action are unacompanied by a demonstration of meaningful harms or actual prohibitions or barriers to deployment. They lack sound legal support, and invite the Commission to violate basic Constitutional principles. Providers may not like that the law guarantees states and local governments a role in the deployment of wireline and wireless facilities, but that alone does not entitle them to federal preemptive action. In sum, industry filings and the record are devoid of solid legal or factual foundations for any declaratory rulings,

rulemakings or even further exploratory proceedings. The Commission should not engage in further regulatory proceedings on the topics in the NOIs. It would be arbitrary, capricious, and counter-productive to impose additional federal regulations – there is no reason to suppose any legitimate interest would be advanced, and federal preemption is not supported.

III. THE RECORD SHOWS THERE IS NO NEED FOR MORE FEDERAL RULES OR RULEMAKING PROCEEDINGS

A. The Record Reflects A Lack Of Evidence Of Actual Harms Or Prohibitions On Deployment, Showing That There Is No Need For Further Commission Action

1. Industry Filings Don't Comply With Commission Requirements And Don't Demonstrate Widespread Problems.

The issues raised in these dockets are virtually identical to those raised in the pending *Mobilitie* docket[4] and as a result, at the time they filed comments in these dockets, supporters of additional Commission regulations and federal takings of property for the benefit of companies who are assuming no obligations to provide service to the public, were well aware that there was substantial opposition to additional rules based on (a) economic, safety, and other studies demonstrating that the sorts of rules proposed would not advance the public interest, and could lead to substantial harms that would delay 5G deployment; (b) information that showed that some wireless providers and some wireless infrastructure providers were seeking to install, and were installing intrusive and unsafe wireless installations as "small cell" installations; (c) a careful rebuttal of claims by the wireless industry of widespread abuse. Commenters also noted that industry had by and large failed to provide specific, supported examples of significant deployment problems caused by states or localities.

[4] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421 ("Mobilitie petition"). The comments filed by Smart Communities in the Mobilitie docket are referred to herein as "Mobilitie Docket Smart Communities Comments" (filed March 8, 2017) and "Mobilitie Docket Smart Communities Reply Comments" (filed April 7, 2017).

Among other things, members of this coalition, their experts and other local public agencies submitted substantial facts and evidence in the Mobilitie docket[5] and again in comments in these dockets which demonstrated that where delay has been documented, the vast majority of delay can be attributed to incomplete applications and siting requests that are improperly made, not to local barriers.

Having already seen those filings, and in light of the language of the NOIs and NPRM issued in this proceeding, one would have expected for the initial industry comments to include some expert rebuttal, specific factual examples of problems claimed (rather than unsupported claims to which it is impossible to respond). Instead, the record thus far reflects a startling absence of meaningful substantiation to support service provider assertions that substantial barriers exist to broadband deployment. Aesthetic requirements, duration of shot clocks, costs and fees, and other terms and conditions associated with accessing public rights-of-way and governmental infrastructure are broadly assailed in the record, but are rarely supported by citations to specific communities or policies or examples of actual harm arising from such policies.

To the extent relief rests on Section 253,[6] the record even more convincingly fails to justify the oft-repeated assertions that these barriers rise to a level sufficient to satisfy Section 253's language regarding policies that prohibit or have the effect of prohibiting deployment. Commenters point instead to policies which may cause them to incur some costs as they seek to take advantage of municipal rights-of-way and municipal infrastructure, or that may inconvenience providers as they seek to gain access to municipal resources in order to offer service to consumers.

[5] *See generally Id.*

[6] 47 U.S.C. § 253.

With few exceptions, commenters seeking Commission action against local authority fail to respond to the Commission's requests, much less heed, the statutory language of Section 253(d) in their comments. Furthermore, Section 253(d) requires that, before the Commission may utilize its authority to preempt under Section 253(a) or (b), it must provide notice and seek comment on particular state or local policies, rules, or regulations at issue. The Commission asked commenters to "explain their concerns in sufficient detail to allow State and local governments to respond," yet the record remains light on particularized examples of complaints.[7] As Smart Communities discussed at length in initial comments, and further examined below, Section 253(d) serves to limit the Commission's ability to engage in general rulemaking pursuant to Section 253's preemption authority. Particularized identification of policies at issue is required by statute, but the record is largely devoid of these essential details. Smart Communities trust that the Commission will disregard improperly formed claims for relief which fail to comply with Section 253(d). As a general matter, whether raised in the NPRM, in the NOIs or otherwise, such nameless and vague accusations are not "sufficiently supported and credible for purposes of decisional reliance" and thus should be ignored by the Commission.[8]

2. Carriers Continue To Celebrate Their Accelerating Deployment, While Telling The Commission They Need Relief From Barriers Which Prevent That Deployment.

Were the comments of wireless providers in these proceedings to be believed, a vast array of practices implemented by state and local governments are having a crippling impact on the ability of wireless providers to deploy new services to meet consumer demands and compete

[7] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, ¶94 (rel. Apr. 21, 2017) ("Wireless NPRM/NOI").

[8] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Denying Request for Extension of Time, WT Docket No. 17-79, FN 6 (rel. Jul. 13, 2017).

in the marketplace.[9] The public statements of those same companies, however, suggest otherwise. All four major nationwide wireless carriers are engaged in aggressive deployment of innovative technologies at a breakneck pace, and take every opportunity to celebrate their deployment and innovation. To be sure, celebrating the important progress these companies are making in deploying wireless services is an essential part of their marketing and business strategies, but their statements and releases announcing deployment plans and success stories stands in stark contrast to the litany of complaints and claims of prohibitions upon deployment submitted here. Actual or *de facto* prohibitions – that narrow category of policies the Commission has authority to preempt – would surely prevent providers from achieving just the kinds of deployment and investment successes they so frequently celebrate.[10]

As stated in our initial comments, the designs and standards for true 5G have not been set, carriers are in the process of conducting technical trials, and test roll-outs, without any real indication that ultimate deployment will be delayed. In its 2016 Annual Report, Lowell McAdam, President and CEO of Verizon Communications, Inc., wrote "In 2016, we conducted successful technical trials of 5G infrastructure and will follow up in 2017 with pre-commercial pilots in 11 markets around the country in preparation for introducing fixed wireless service."[11] In September 2016, AT&T announced that it was nearly ready for field trials of its Project

[9] *See, e.g.* Comments of AT&T, WT Docket No. 17-79 at 2 (Jun. 15, 2017) ("AT&T Wireless Comments"); Comments of T-Mobile, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (Jun. 15, 2017) ("T-Mobile Comments"); Comments of Sprint Corporation, WC Docket No. 17-84, WT Docket No. 17-79, at ii (Jun. 15, 2017) ("Sprint Comments"); Comments of Verizon, WC Docket No. 17-84, WT Docket No. 17-79, at 1 (Jun. 15, 2017) ("Verizon Comments").

[10] For purposes of this discussion, we are not distinguishing between a claim of effective prohibition under Section 253, and a claim of effective prohibition under Section 332. As we explained in our initial filing, where wireless siting is involved, Section 253 does not apply at all.

[11] Lowell McAdam, Chairman and Chief Executive Officer, Verizon Communications Inc., Annual Letter to Shareholders (Dec. 2016), *available at* http://www.verizon.com/about/sites/default/files/annual_reports/2016/letter.html.

AirGig technology to deliver wireless broadband using power line infrastructure, announcing that they "expect to kick off [their] first field trials in 2017."[12]

Of course, most of the deployment now occurring does not involve 5G (although that is often a code word used to justify preemption); rather deployment today involves continued roll-out of fourth generation LTE technology and densification of 4G networks. That also proceeds apace.[13] T-Mobile celebrated expanding its network by more than 2000 new cell sites over the courts of 2016.[14] Sprint routinely announces network densification efforts, including recent promises to bring "hundreds of network enhancements" to metropolitan areas like Milwaukee, Chicago, Detroit, and New Orleans, since March 2017 alone.[15] These ongoing investments and densification efforts suggest a marketplace which is permissive, rather than prohibitive, where deployment is concerned.

If local policies rose to the level of prohibitions, this level of deployment simply would not be happening. Providers may not like that the law guarantees states and localities a role in the deployment of wireline and wireless technologies, but that does not entitle providers to

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[12] Press Release, *AT&T Labs' Project AirGig Nears First Field Trials for Ultra-Fast Wireless Broadband Over Power Lines*, (Sep. 20, 2016), http://about.att.com/newsroom/att_to_test_delivering_multi_gigabit_wireless_internet_speeds_using_power_lines.html

[13] The wireless industry's own data makes it clear that deployment is proceeding. Scott Bergmann Prepared Statement to House E&C, April 5, 2017: "In just seven years, wireless providers have blanketed the country with $200 billion in network spending to deliver 4G LTE mobile broadband nationwide. Today, 99.7 percent of Americans have access to 4G LTE service, and 95.9 percent can choose from three or more 4G LTE providers."

[14] T-Mobile 2016 Annual Report (2017) ("We had approximately 66,000 cell sites, including macro sites and distributed antenna system network nodes as of December 31, 2016, compared to approximately 64,000 cell sites as of December 31, 2015"), *available at* http://investor.t-mobile.com/Cache/1001223313.PDF?O=PDF&T=&Y=&D=&FID=1001223313&iid=4091145.

[15] *See, e.g.* Press Release, *The Secret's Out! Sprint to Illuminate Chicago with Thousands of Network Enhancements and 100+ New Stores* (May 8, 2017), http://investors.sprint.com/news-and-events/press-releases/press-release-details/2017/The-Secrets-Out-Sprint-to-Illuminate-Chicago-with-Thousands-of-Network-Enhancements-and-100-New-Stores/default.aspx; Press Release, *Sprint's New Cell Sites Hit Network Coverage Out of the Park in Downtown Detroit* (Apr 3, 2017), http://investors.sprint.com/news-and-events/press-releases/press-release-details/2017/Sprints-New-Cell-Sites-Hit-Network-Coverage-Out-of-the-Park-in-Downtown-Detroit/default.aspx.

preemptive action. The law does not entitle carriers to relief from the costs of doing business – only from prohibitions.

3. Industry Supporters Failed To Provide Any Expert Evidence To Back Their Claimed Impacts Of Local Regulation And Practices On Investment.

The record developed in this proceeding fails to provide substantive economic analysis to substantiate alleged harms to providers or barriers which have the effect of prohibiting deployment. The Information Technology and Innovation Foundation's submission, for example, speaks at length of the risks posed by "legacy, inefficient processes that are not well suited to modern network deployment" but then jumps straight to policy proposals to 'solve' the problem, without offering any clear examples of harm to substantiate those claims.[16]

Industry assertions that broadband investment and deployment is hampered by local policies remain largely unsubstantiated. Commenters generally fail to offer substantive economic analysis to support their assertion that, but for municipal policies, broadband deployment would be happening that simply isn't happening today (and thus would satisfy Section 253's requirements to justify preemption). Additionally, broadband providers fail to offer sworn statements from executives which might support their positions.[17]

Furthermore, the record reflects a striking lack of studies or independent analysis proffered by industry stakeholders in support of their demands and assertions. As discussed in

[16] Comments of the Information Technology and Innovation Foundation, WC Docket No. 17-84, WT Docket No. 17-79, at 2 (Jun. 15, 2017) ("ITIF Comments").

[17] In contrast to the absence of substantive evidence presented by aggrieved parties in support of their claims in this proceeding, it is not uncommon for parties seeking to substantiate their assertions when requesting Commission relief, to substantiate their grievances with sworn declarations. *See, e.g.*, Comments of DISH Network, Declaration of Melisa Ordonez, Director, Local Programming, GN Docket No. 16-142 (May 9, 2017). In fact, sworn statements of precisely this nature have been submitted in the wireline proceeding captioned above. See Declaration of Susan M. Baldwin on behalf of the National Association of State Utility Consumer Advocates, et. al., WC Docket No. 17-84 (Jun. 15, 2017), No party claiming harm or requesting preemption in this proceeding has offered such a statement to support their claims.

the *Mobilitie* docket and Smart Communities' initial filings, the Accenture report (reentered in this docket by the Free State Foundation[18]) lacks substantiation for its claims of 24-month delays in application processing, lacks specific examples or evidence to support claims of "challenges" facing small cell providers, lacks empirical analysis and evidence, and concludes that in any event, deployment is proceeding apace.[19] The one new whitepaper submitted comes from Deloitte, regarding the future of broadband deployment.[20] While it identifies a number of policies which it alleges have a bearing on the future of broadband, its contents do not actually address prohibitions or barriers to deployment. It does not appear to discuss local policies at all. Indeed, when describing those federal and state (but not local) policies which are allegedly the source of problems, the report does not at any point describe them as barriers, prohibitions, obstacles, or impediments to the deployment of networks – wireline or wireless.[21] Instead, it focuses on the *transition* to IP-enabled services; a distinct and separate issue raised by the Commission in the Wireline NPRM. It discusses rules and policies as "regulations that prevent IP migrations" but at no point offers even any text, let alone evidence or analysis which substantiates, a connection between those policies and allegedly reduced broadband deployment. The Deloitte report, in total, describes the future need for broadband infrastructure, but barely addresses or even suggests that any policies related to deployment pose so much as an inconvenience, let alone an outright prohibition.

[18] *See* Comments of the Free State Foundation, WT Docket No. 17-79 (Jun. 15, 2017)

[19] Accenture Strategy study, filed in a January 13, 2017 *ex parte* by CTIA entitled "Smart Cities; How 5G Can Help Municipalities Become Vibrant Smart Cities" ("Accenture Study"). The rebuttal was in the ECONorthwest Reply Report.

[20] Deloitte Report Entitled "Communications infrastructure upgrade: the need for deep fiber", WT Docket No. 17-79 (Jul. 11, 2017).

[21] *Id.* at 20.

Other groups which allege substantial barriers are similarly unable to offer substantiation for their assertions. The R Street Institute offers some examples, but fails to provide policy justification for the broad preemption and rulemaking-based approach it seeks, or to connect the dots between those particular data points it discusses, and any lost or prohibited deployment.[22] At no point does the record provide any economic or other substantive evidence that broadband deployment that would otherwise be happening, is not moving forward due to the role of local governments. The absolute most any commenter is able to offer on this point are legal arguments in favor of an expansive interpretation of the Commission's statute. Such a reading is industry commenters' only hope of success precisely because they are unable to present any substantive proof to support their claims.[23]

4. The Coalition's Expert Reports Demonstrated New Rules Aimed At Local Governments Are Unnecessary And Could Be Counter-Productive Have Not Been Refuted.

In the *Mobilitie* docket, members of this coalition submitted numerous expert reports, which were resubmitted in the comments round of these two proceedings, along with additional expert reports previously presented to the Commission.[24] No one provided expert evidence to challenge the conclusions of these reports in the Mobilitie docket or in the comments filed in the present dockets. The Coalition's unrefuted expert reports show, among other things, that:

- Small cells can have significant impacts on safety and on property values, because small cells are not necessarily small;[25]

[22] *See* Comments of the R Street Institute, WT Docket No. 17-79, at 6-9 (Jun. 15, 2017) ("R Street Institute Comments").

[23] *Id.*

[24] *See generally* Smart Communities Wireless Comments at Exhibits 1-7; Smart Communities Wireline Comments at Exhibits 1-3.

[25] "Report and Declaration of Andrew Afflerbach For the Smart Communities Siting Coalition" (referred to herein as the "CTC Declaration"). The CTC Declaration was attached to the Smart Communities Wireless Comments as Exhibit 1; "Definitions of Small Cells, and the Review of Small Cell Applications, Supplemental Report" (referred to herein as the "CTC Reply Report"). The CTC Reply Report was attached to the Smart Communities Wireless

- While many localities are making significant efforts to accommodate small cells, the applications are often not properly prepared, sometimes lacking even basic engineering analysis, and therefore require multiple submissions and resubmissions;[26]

- There is a significant expense associated with reviewing the applications that needs to be recovered;[27]

- Allowing localities to recover costs and obtain fair market value for property (including public rights-of-way) used will actually enhance deployment, and ensure that advanced systems are deployed in a rational way;[28]

- There is no reason to suppose charging less than market rates for public property or public rights-of-way will lead to deployment of 5G or advanced systems in a rational way.[29]

In contrast to the unsupported allegations of those seeking additional federal regulations, the Coalition's expert analyses are the only analyses that are "sufficiently supported and credible for purposes of decisional reliance" and thus should be weighed heavily by the Commission when considering taking any actions in these dockets.[30] Those analyses show that it would be arbitrary, capricious and counter-productive to impose additional federal regulations – there is no

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Comments as Exhibit 1A; "Report and Declaration of David E Burgoyne for the Smart Communities Siting Coalition"(referred to herein as the "Burgoyne Declaration"). The Burgoyne Declaration was attached to the Smart Communities Wireless Comments as Exhibit 3;"Report and Declaration of Steven M. Puuri for the Smart Communities Siting Coalition" (referred to herein as the "Puuri Declaration"). The Puuri Declaration was attached to the Smart Communities Wireless Comments as Exhibit 4.

[26] CTC Declaration and CTC Reply Report.

[27] *Id*.

[28] "The Economics of Government Right of Way Fees" (referred to herein as the "ECONorthwest Declaration"). The ECONorthwest Declaration contains an economic analysis of the effect of limiting the amounts that may be charged for use of the public rights-of-way and concludes that the rulings sought by Mobilitie will not promote economically efficient deployment of public rights-of-way and will discourage innovation. The ECONorthwest Declaration was attached to the Smart Communities Wireless Comments as Exhibit 2. "Reply Declaration of Kevin E. Cahill, PhD, Regarding the Accenture Report and the Economics of Local Government Right of Way Fees" (referred to herein as the "ECONorthwest Reply Report"). The ECONorthwest Reply Report was attached to the Smart Communities Wireless Comments as Exhibit 2A.

[29] ECONorthwest Declaration and ECONorthwest Reply Report.

[30] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Denying Request for Extension of Time, WT Docket No. 17-79, FN 6 (rel. Jul. 13, 2017).

reason to suppose any legitimate interest would be advanced, and federal preemption is not supported.

B. Respect For The Federal System Of Government And Its Division Of Powers And Responsibilities Would Better Serve Communities And Industry

1. Placement Will Always Be A Fundamentally Local Endeavor

In crafting the Communications Act of 1934 ("Act") and its subsequent amendments and revisions, Congress has always exercised particular care to respect the important roles played by states and local governments in the deployment and governance of communications technologies and services. This shared-jurisdiction framework ensures that an appropriate balance is struck between consistent national policy, respect for our system of laws and the role states play in that system, and the quintessentially local nature of infrastructure deployment and service delivery as it takes place on a community-by-community basis. Smart Communities reiterate their concern that the Commission, by its proposals, and industry supporters through their comments, either fail to recognize and respect this critical distinction, or seek to disregard the clear design of Congress by dismissing the role of states and local governments wherever it suits. Siting and deployment of wireless and wireline facilities will always be a fundamentally local matter, both in the law and in practice. Congress devoted sections of the Act to preserving and protecting that local role, and balancing it where appropriate, but at no point does the Act give the Commission the authority to simply clear localities out of the way for providers' convenience.

2. The Commission Should Encourage Further Cooperative Efforts Through Existing Mechanisms.

In Smart Communities' opening comments, we urged the Commission to encourage further cooperative efforts in fora already established such as the Broadband Deployment Advisory Council ("BDAC") and the Intergovernmental Advisory Committee. While it is notable that industry support for such partnership opportunities in comments is often either

absent or vague,[31] some in industry *did* express support for this approach at least to an extent.[32] We sincerely hope that Commission will focus on cooperative and collaborative initiatives in existing fora rather than continuing to pursue unnecessary and ultimately unnecessary preemptive actions.

This is particularly true with respect to comments urging the Commission to set the prices, terms and conditions for access to public property. As we pointed out in our initial comments, the Commission lacks authority to set those terms and conditions. The industry comments fail to actually acknowledge or even mention some of the actual complexities associated with requiring provision of access to street lights and other vertical structures at cost. One notable example of an incident where a wireless provider installed facilities itself without authorization was the *Malibu Canyon Fire of 2007*, which burned 3,836 acres, 36 vehicles and 14 structures, including Castle Kashan and the Malibu Presbyterian Church. The fire also damaged 19 other structures and injured three firefighters.[33] After almost six years, the California Public Utilities Commission approved a settlement over $50 million, and imposed re-inspection requirements for utility poles.[34] The California Public Utilities Commission is now

[31] Comments of Crown Castle, WC Docket No. 17-84, at 53 (Jun. 15, 2017) ("Crown Castle Comments").

[32] Comments of CALTEL, WC Docket No. 17-84, at 18 (Jun. 15, 2017) ("CALTEL Comments") ("CALTEL believes that the development of recommendations and best practices by the Broadband Deployment Advisory Council (BDAC) is probably the most effective and efficient way to surface and resolve concerns about unreasonable terms and conditions, including local moratoria"); Comments of the Wireless Infrastructure Association, WT Docket No. 17-79, WC Docket No. 17-84, at 6, 25 (Jun. 15, 2017) ("WIA Comments") (acknowledging a role for the BDAC in addressing wireless deployment obstacles and resolving fee disputes); Comments of Extenet, WT Docket No. 17-79, WC Docket No. 17-84, at 15-16, 51 (Jun. 15, 2017) ("Extenet Comments") (suggesting BDAC role developing model safe harbor license or pole attachment agreements).

[33] Melissa Caskey, *CPUC Approves $51.5 Million Malibu Canyon Fire Settlement*, The Malibu Times (Sep. 19, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html.

[34] California Public Utilities, Data Request, (Jan. 27, 2017). Check D.13-09-026, D.13-09-028

pursuing several proceedings specifically to tackle issues related to reconciling competitive wireline and wireless access with utility pole safety.[35]

All of this is to say, the installation of structures in the public rights-of-way, and the attachment of devices to those structures raises safety issues and inspection issues that must be addressed properly. Those include questions as to liability: who will pay for inspections (which themselves can be quite costly), who will pay for engineering analyses, and so on.[36] Any strict federal rule by the Commission would go beyond preemption (all that is permitted under Section 253 or Section 332), to effective *prescription*. Any rule which required taxpayers to effectively subsidize the lease of public property in any way – including by requiring them to assume an ongoing risk of error or to pay for inspections without full compensation – would not only require justification far beyond what is within this record, but would also raise significant issues under the Fifth and Tenth amendments, and would exceed any obvious source of authority. In addition, the use of local government structures can foreclose use of the structure for important public purposes because the space within and upon such structures is limited. Rules compelling access have significant future effects on infrastructure. Some of the elements that are criticized by commenters (requiring that attachers maintain an inventory of street poles[37]) are actually critical to public safety: the types of poles required to support wireless installations are often not poles that are readily available to a locality, and if a street light is downed, and there is no

[35] Order Instituting Investigation into the Creation of a Shared Database or Statewide Census of Utility Poles and Conduit in California, I.17-06-027 (June 29, 2017); Order Instituting Rulemaking into Access by Competitive Communications Providers to California Utility Poles and Conduit, Consistent with the Commission's Safety Regulations, R.17-06-028, consolidated with R.17-03-009 (Order Granting Petition 16-08-016, and . . . Instituting Rulemaking to consider Amendments to the Revised Right of Way Rules Adopted in D.16-01-046 (WIA Petition/Rulemaking), issued on April 3, 2017).

[36] Giuseppe Parise, Luigi Martirano, and Massimo Mitolo, *Electrical Safety of Street Light Systems*, IEEE, April 29, 2011 (available at http://ieeexplore.ieee.org/document/5756684/). Attachments to street lights likewise create risks given that street lights themselves under fault conditions, present hazards to the public.

[37] Conterra-Southern Light-Uniti Comments at 12.

available pole, that creates an ongoing risk. Asking localities to maintain an inventory of spare poles that they would not normally have in order to lease those facilities to wireless providers at cost is nothing more than a tax on the public – a tax the Commission has no authority to impose, but should not impose as a matter of policy.

The details of access are not simple, and federal rules – even if they could be developed – would need to carefully balance and address many intersecting issues. Localities, states and industry are working to develop contracts and other rules that permit access to different types of vertical structures. Much like the perspective expressed by the National Association of Regulatory Utility Commissioners,[38] we believe that a cooperative approach that recognizes state and local roles is a far more sensible way to resolve issues, as opposed to what would inevitably be a heavily litigated and expensive federally mandated regulatory process.

3. The Commission Should Exercise Extreme Caution In Taking Any Actions As A Result Of These Proceedings.

Smart Communities note that a variety of parties have raised wide-ranging claims and arguments for preemptive actions against local governments in response to the Commission's Wireless NPRM and the NOIs. This was perhaps inevitable because of the Commission's decision to combine Notices of Inquiry and Proposed Rulemakings in consolidated dockets and comment cycles, and the open ended nature of some of the Commission's questions.[39] However, this intertwined approach substantially increases the need to clearly distinguish between

[38] Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 17-84 at 2-3(Jun. 15, 2017) ("NARUC Comments") (referring to a resolution adopted at the February 2017 meetings in Washington, D.C., that "'applauds the FCC and Chairman Ajit Pai for initiating the Broadband Deployment Advisory Committee and looks forward to an active role in that effort' but also specifically 'opposes further efforts in petitions asking the FCC to preempt the traditional authority of the State and local authorities by replacing intrastate regulation of rights-of-way, Pole Attachments, and other telecommunications facilities or services of public utilities with comprehensive federal mandates imposed by the FCC.")

[39] *See, e.g.* Wireless NPRM/NOI at ¶ 97-99; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 at ¶104-108 (rel. Apr. 21, 2017) ("Wireline NPRM/NOI").

comments offered in reply to the Commission's rulemaking from any proposals or requests made in general response to the Notices of Inquiry. Smart Communities urge the Commission to recognize this critical distinction as it conducts its review of the record.

The Commission's authority to act pursuant to some of the proposals is clearly constrained, not only by statute but by its own practice and precedent. As Smart Communities noted in initial comments, for instance, the Commission has limited authority to proceed pursuant to the Notice of Inquiry.[40] While the agency has broad authority to choose how to proceed, some of the comments seem to envision precisely the sort of action that the D.C. Circuit found requires notice and comment rulemaking.[41] The Commission has also long recognized and respected restrictions on its ability to act pursuant to Section 332(c)(7), including recognizing that it cannot limit the scope of local authority or compel local action.[42] Furthermore, the Commission should not proceed, as some parties have suggested, directly to the implementation of declaratory rulings about particular types of prohibitions.[43] Contrary to the assertions of T-Mobile, the proceedings thus far conducted do not provide sufficient information to support the issuance of a declaratory ruling.[44] This is in part due to commenters, including T-Mobile, having ignored the Commission's request for particularized information as required by Section 253(d) regarding local policies which allegedly prohibit deployment. As Smart Communities pointed out initially, the Commission's own practice regarding preemption under Section 253 requires "credible and probative evidence that the challenged requirement falls within the proscription of

[40] *See, e.g.* Smart Communities Wireline Comments at 5 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999))

[41] *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-09 (D.C. Cir. 1993); *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975)).

[42] Smart Communities Wireless Comments at 38 (citing Shot Clock Order at ¶39).

[43] WIA Comments at 29.

[44] T-Mobile Comments at 55-56.

section 253(a) without meeting the requirements of Section 253(b) and/or (c)."[45] No such evidence has been proffered in this record. Accordingly, the Commission cannot proceed directly, as the absence of particular evidence and commentary in effect deprives those local governments whose policies are challenged, with adequate notice that their rules may be subject to preemptive action.

Finally, Smart Communities reiterates that the sorts of relief sought by commenters in this proceeding are appropriate for notice-and-comment rulemaking, rather than declaratory action. As discussed above, the record before the Commission today reflects a near-total lack of particularized complaints. The requests made by carriers and infrastructure companies are more properly described as seeking the adoption of generalized nationwide standards impacting every state and local government. The Commission's Notice appears to contemplate the adoption of similar nationwide rules, but fails to provide specifics on what its actual proposal might be. While the Commission certainly retains broad discretion in choosing how to proceed, the actions sought by commenters seem to be precisely of the sourt that the D. C. Circuit has long held require notice and comment rulemaking.[46]

IV. NO NEW RULES SHOULD BE ADOPTED IN THE WIRELESS NOTICE OF PROPOSED RULEMAKING

A. Commenters Fail To Justify Adoption Of "Deemed Granted" Remedies Under Section 332(c)(7)

Not surprisingly, industry commenters urge the Commission to adopt a deemed granted remedy for shot clocks under Section 332(c)(7). The policy and factual justification for this dramatic departure from the settled Commission position that deemed granted is not appropriate

[45] *In the Matter of TCI Cablevision of Oakland County, Inc.*, FCC 97-331, 12 FCC Rcd. 21,396, 21440 at ¶ 101 (Sept. 19, 1997).

[46] *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-1109 (D.C. Cir. 1993); *General Motors Corporation v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975)).

under Section 332(c)(7) is largely that it is expensive and inconvenient to sue local agencies for violations of the shot clock.[47] This policy justification ignores the importance of ensuring that local agencies have the ability to explain why the presumptively reasonable 150-day and 90-day time periods are inappropriate under the particular facts and circumstances of an individual case. This approach is required by the plain language of Section 332(c)(7).

Commenters seek to disparage this careful balancing test by suggesting that federal courts are not meeting their obligations. For example, Lighthouse attributes alleged shot clock violations to the "… fact that it is widely known that a rebuttable presumption is easy to overcome in federal court, essentially making the remedy so toothless that it can easily be ignored."[48] This unsupported attack on the judiciary is misplaced. As explained in Smart Communities' Opening Comments, the vast majority of agencies meet the shot clocks and take their obligations seriously.[49] If a dispute arises regarding whether a presumptively reasonable timeline is appropriate in a given instance, it is necessary for the courts to resolve that dispute. The fact that Lighthouse has apparently lost many of these cases does not render the shot clock toothless but calls into question the reasonableness of Lighthouse's deployment strategy and application process.

Even if the Commission agrees with commenters that a deemed granted remedy under Section 332(c)(7) is advisable, the Commission is unable to adopt it. The Smart Communities

[47] Comments of CompTIA, WT Docket No. 17-79 (Jun. 15, 2017) ("CompTIA Wireless Comments"); Comments of Lightower Fiber Networks, WT Docket No. 17-79 (Jun. 15, 2017) ("Lightower Comments"); Comments of CCIA, WT Docket No. 17-79, WC Docket No. 17-84 (Jun. 15, 2017).

[48] Lightower Comments at 7.

[49] Smart Communities Wireless Comments at 46.

outlined in our initial comments why the three alternatives proposed by the Commission for establishing a deemed granted remedy are unavailing.[50]

Of the three alternatives, most commenters who urge the Commission to adopt a deemed granted remedy gravitate toward establishing the deemed granted remedy as an irrebuttable presumption. As an example, Verizon suggests that the Commission has the authority to adopt a deemed granted remedy as an irrebuttable presumption under Section 332(c)(7) under the Fifth Circuit's decision in *City of Arlington v. FCC*.[51] Verizon reaches this conclusion on two bases: (1) the legislative history relied on by the Commission in the Shot Clock Order was not accepted by the Fifth Circuit and (2) adopting an irrebuttable presumption is consistent with the Commission action under Section 621 when generating a deadline for cable franchise negotiations.

Verizon's argument is unavailing because it fails to acknowledge the clear difference in statutory language authorizing Section 332(c)(7)'s "reasonable time" requirement and Section 6409's mandate that communities "shall approve" applications. Reference to the Fifth Circuit's analysis of legislative history does not modify this plain language. It also overemphasizes its point. The Fifth Circuit decided that legislative history was unclear regarding whether the Commission had any authority to adopt shot clocks. It did not decide that the legislative history was silent on whether Section 332(c)(7) authorizes the Commission to impose a deemed granted or similar remedy. In addition, Verizon's citation to Section 621 and cable franchises is unavailing. It ignores the statutory language in Section 332(c)(7) that requires localities to act within a reasonable period of time "after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." By definition, an irrebuttable presumption does not take into account the "nature or scope" of the request.

[50] Smart Communities Wireless Comments at 37-43.

[51] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012).

Similarly, this approach is inconsistent with the legislative history. This history expressly notes that Section 332(c)(7) is not intended to "give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision."[52]

In addition, the Competitive Carriers Association ("CCA") supports its call for the adoption of an irrebutable presumption by noting that the remedies provision in Section 332(c)(7) allows a local agency to petition the court for relief.[53] Citing the statutory language that "any person adversely affected by any final action or failure by a State or local government…may" seek redress, CCA notes that "person" could include a local agency if it felt that the irrebutable presumption "unduly constrained" the agency. While a local agency can certainly fall within the definition of "person," CCA's interpretation completes ignores the balance of the sentence that refers to a decision "by a State or local government." Essentially, CCA's argument is that one can interpret this sentence to allow a local agency as a "person" to sue itself (and presumably the applicant as a real party in interest) for being forced to approve a request based on an irrebutable presumption adopted by the Commission. This interpretation strains all credulity and must be rejected.

B. Industry Commenters Fail To Identify Any Factual Or Legal Basis For Modifying Existing Shot Clocks.

A number of industry commenters support the call for new and modified shot clocks. These include simply shortening existing shot clocks, redefining existing shot clocks to include time spent negotiating licenses or other agreements for use of public property, harmonizing collocation shot clocks for all applications that are not subject to the Spectrum Act (or a subset of

[52] 1996 S. Conf. Rpt. 104-230 at 208

[53] Comments of Competitive Carriers Association, WC Docket No. 17-84, WT Docket No. 17-79, at 11-12 (Jun. 15, 2017) ("CCA Comments").

those applications) with those that are subject to the Spectrum Act or establishing different time frames for small cell or DAS deployments, or for requests that include "batches" of requests submitted by a single provider. While industry commenters urge the Commission to adopt these proposals, they fail to articulate sufficient rationales, legal or otherwise, to do so.

1. A Shorter Time Does Not Mean A Reasonable Time

Many industry commenters request that the Commission adopt modified shot clocks generally to be 90 days for new applications and 60 days for all collocations, including those not subject to the Spectrum Act.[54] As an initial matter, any request to modify the existing shot clocks for new applications is beyond the scope of this NPRM. The Commission did not seek comments on any proposal to modify the existing 150-day shot clock for new applications.[55] That being said, the requests for establishing shorter shot clocks fail for another reason: commenters failed to articulate any factual or legal basis for these modifications.

Most commenters request shorter shot clocks simply to speed up deployment.[56] This is not a sufficient basis to modify the shot clocks.[57] Section 332(c)(7) requires localities to act on an application "… within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." It is notable that textually, reasonableness turns on the "nature and scope" of the request; the business plans of the applicant are irrelevant. Hence, even if there were a business need for speed, the review period must be based upon the time required to review the request within the context of a

[54] *See, e.g.* Comments of CTIA, WT Docket No. 17-79, at 7 (Jun. 15, 2017) ("CTIA Comments"); Lightower Comments at 12; ExteNet Comments at 8-11; T-Mobile Comments at 18.

[55] Wireless NPRM/NOI at ¶18.

[56] *See, e.g.*, CTIA Comments at 2.

[57] Similarly, CTIA appears to suggest that delay in processing a wireless application can be an "effective prohibition" under Section 253. (CTIA Comments, p. 12.) This is a misapplication of the test under Section 253 as it requires an individualized examination of each agency's practice before preempting the local agency.

discretionary land use or zoning process. The Section 332 shot clocks currently create presumptively reasonable time periods for agencies to review applications. Simply speeding up deployment for the sake of speeding up deployment without any consideration of countervailing factors, especially a community's ability to actually review an application within the requested time period, does not adhere to the plain statutory language.

Some commenters do attempt to articulate factual justifications for shorter clocks. For example, T-Mobile notes that communities now have more experience with wireless applications than when the initial shot clocks were adopted, and they should be able to more quickly review and approve them.[58] This suggestion assumes that processing a land use application is something akin to an inverse Moore's Law, where increased experience and knowledge will lead to exponential reductions in time that ultimately results in nearly instantaneous review. This is simply wrong. Cities and counties have reviewed wireless and land use applications for many years, and there are public noticing, hearing and other requirements that necessarily take time.[59] Increased "experience" cannot avoid these legal requirements. The argument also ignores the increasing complexity and volume of requests seen by local governments.[60]

In another example, GCI suggests that shortened shot clocks are necessary due to the short construction season in Alaska (generally June to September according to GCI).[61] While

[58] T-Mobile Comments at 20.

[59] *See e.g.,* California Government Code, §§ 65090, 65091 (requiring notice before specified land use hearings).

[60] Pole owners express similar concerns about shortening shot clocks in the wireline docket. For example, AT&T expresses opposition to proposals to shorten the pole attachment application review and survey period, given the need to determine whether the pole can accommodate the attachment, and the increasing complexity and volume of pole attachment requests. *See* AT&T Comments at 8. The industry argument for shortened shot clocks based on "experience" might have a bit more force if one assumed that over the years, proposals had become identical or nearly identical, and submissions and analyses were routinized. In fact, the nature and volume of requests are changing, and while localities do make efforts to use experience to shorten review periods, their ability to do so depends on their ability to establish mandatory standards and design requirements. The current regulatory scheme (as explained in our initial comments) actually discourages streamlined approaches.

[61] Comments of General Communications Inc., WT Docket No. 17-79, at 5 (Jun. 15, 2017) ("GCI Comments").

Smart Communities supports the deployment of wireless facilities throughout the country, including in Alaska, it is wholly illogical to determine what constitutes a reasonable time to review a wireless facilities based on the climatic difficulties of the country's least populous state. Moreover, it seems that GCI is mistiming its application process. Assuming Alaska has a June to September construction schedule, a complete application for a new facility filed in October must be approved or denied by February or March. If anything, GCI's comments support continuing or expanding the current shot clocks.

T-Mobile suggests that shorter shot clocks are reasonable because some jurisdictions have processed applications more quickly than the current deadlines. It notes that the Commission has recognized that some jurisdictions process collocations in 14 days or less and new facilities in 75 days or less.[62] Communities that process applications as efficiently and quickly as possible should be applauded, but without context to explain how this was achieved in some instances and not in others, the number itself is of little value. As noted in its Opening Comments, Smart Communities strongly supports efforts by the Commission to encourage public-private cooperation and the development of model codes and other best practices. That being said, the legal standard (and the question in this NPRM) is not how quickly can local agencies process applications but what is a reasonable time for them to do so, taking into account the nature and scope of such request.[63]

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[62] T-Mobile Comments at 19.

[63] The initial Section 332 shot clocks were based primarily on a review of the time for action on wireless applications under state laws; the shot clock was merely presumptive in part because the state laws relied upon allowed for longer periods of consideration where justified; that is, state laws and the Commission rules recognized that it was not "reasonable" to demand action by a date certain in all instances. The fact that some applications can be resolved sooner is simply an indication that some applications *are simpler to process*, and that localities are not using the shot clock to delay actions where approval is simple. But that does not mean that as a general matter, a shorter shot clock is appropriate. Indeed, the ability to process applications will in part depend not only on the simplicity of an application but the resources available to a community. Hence, if the Commission in any way limits the resources that a community may use (e.g., if it prevents localities from hiring and charging for the costs of

In addition, industry commenters cited several state statutes with "expedited time frames to lower siting barriers and speed deployment" as justification for shortening review periods for new wireless sites and collocations.[64] However, in at least three of the states mentioned, the statutes recognize the potential need for longer review periods by permitting localities to extend the required time frames. For example, the industry comments noted that Minnesota law requires any zoning application, which includes both collocation and non-collocation applications, to be processed within 60 days. The comments failed to mention, however, that Minnesota also permits parties to extend the timeline.[65] Similarly, the statutory 60-day completion period for small cell application approvals in Virginia may be extended for an additional 30 days,[66] and the statutory 45-day approval period in Wisconsin for collocations may be extended for an additional 45 days.[67]

Lastly, even if the Commission wished to adopt shorter shot clocks, it could not do so based on the record in this proceeding. As noted above, simply seeking to speed up deployment is not sufficient, and any effort to adopt modified shot clocks on this basis would be arbitrary and capricious. "An agency acts arbitrarily or capriciously if it has . . . offered an explanation either contrary to the evidence before the agency or so implausible as not to reflect either a difference in view or agency expertise." *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016). The D.C. Circuit recently determined that the Commission failed to meet this standard when regulating rates for prison calls. *Global Tel*Link v. FCC*, No. 15-1461 (June 13,

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additional employees or technical consultants to review applications), that limitation must also be taken into account in setting what is a "reasonable" time, and would render the existing shot clocks unreasonable.

[64] T-Mobile Comments at 19-20; CTIA Comments at 11-12.

[65] Minn. Stat. § 15.99(2)(a) and (3)(f).

[66] Va. Code Ann. § 15.2-2316.4(B)(1).

[67] Wis. Stat. § 66.0404(3)(c). *See also*, Va. Code Ann. § 15.2-2232(F) [90-day completion period for reviewing non-collocation applications may be extended by 60 days]; Wis. Stat. § 66.0404(2)(d) [90-day completion period for non-collocation applications may be extended by 90 additional days].

2017). In part, this decision invalidated Commission rate caps that were based on the "weighted average per minute cost." This order sought to implement a statute that "each and every" call be fairly compensated. The Commission's caps were set at levels where many calls were unprofitable but the majority of the Commission (Pai dissenting) justified its position on the basis that it would lead to efficiency for larger carriers. The court ultimately determined that the weighted average per minute cost standard was arbitrary because it did not adhere to the statutory language. The record reflected that cost was largely due to regional variation, and the caps would not result in all calls being fairly compensated.

Here, establishing shot clocks solely based on speeding up deployment would be arbitrary and capricious. While the Commission may have some latitude to establish a general standard for reasonable review, that time cannot be an absolute deadline, and must have a factual basis tied to the statutory standard, which does not empower the Commission to adopt standards that ensure the quickest or cheapest deployment of these facilities. Moreover, case law interpreting the Commission's existing shot clocks upheld them based on the fact that 150-day and 90-day deadlines hewed to the statutory language of a "reasonable time."[68] We encourage the Commission to adhere to this statutory language and to reject requests that it establish shot clocks designed solely to speed up deployment.

2. Various Other Requested Modifications Are Unwarranted

Commenters requested various other changes to the existing shot clocks. These include expanding the scope of agency actions subject to the shot clock, modifying how the clocks can be tolled by local agencies, adopting modified shot clocks for small cells or batches of similar

[68] *City of Arlington v. FCC*, 668 F.3d 229, 261 (5th Cir. 2012).

applications, and subjecting all utility poles (whether or not they currently house antennas) to Section 6409. These requests are unwarranted based on the record in this proceeding.

First, some commenters have requested that the Commission expand the scope of the shot clocks to include pre-application meetings and other preliminary efforts, any time spent negotiating a franchise or otherwise obtaining access to public property, especially the public right-of-way, and the issuance of any approvals of permits that typically come post-application like building permits.[69] As an initial matter, adopting a rule including additional authorizations or permits that may be needed within the existing shot clock is beyond the scope of this NPRM. The NPRM does request that commenters address when the shot clock should begin, but it does so in the context of regulatory "pre-application" meetings.[70] In any event, such action is also not supported by the record. If the Commission were to incorporate into the land use process that is the subject of Section 332(c)(7) all other application processes that are required before shovel turns dirt, it would need to take into account the additional work associated with those authorizations and permits and what is clear is that no one has shown that all the work can reasonably be completed within the current shot clocks.[71]

[69] AT&T Comments at 23; Crown Castle Comments at 31; Verizon Comments at 43; CTIA Comments at 15; Sprint Comments at 44-45; T-Mobile Comments at 19-12; Comments of Conterra, Southern Light, and Uniti, WT Docket No. 17-79, at 19 (Jun. 15, 2017) ("Conterra-Southern Light-Uniti Comments"); Comments of Mobilitie, WT Docket No. 17-79, at 6 (Jun. 15, 2017) ("Mobilitie Comments") (seeking modified longer shot clocks for negotiating franchises).

[70] Wireless NPRM/NOI at ¶20.

[71] For example, an application for DAS will often be filed before final make-ready or other engineering work is completed, and thus before the electric utility determines precisely how power will be brought to the system (preliminary work, is often performed, including structural analyses of the facilities to be used). The engineering work requires time and money, and some entities rightly argue that before determining what must be done to use a pole (and obtaining building, electrical and other required permits), it makes sense to determine whether and what installation will be approved for installation as a matter of land use. If, as some propose, all those permits must be issued along with the land use permits, then one of the following has to occur: (a) all engineering work, FAA and federal approvals, MISS Utility work, make ready planning and the like needs to be completed before the application is ever submitted; or (b) the time period must be substantially extended to reflect the time required for all these tasks to be completed seriatim.

Second, some commenters suggest modifying how shot clocks may be tolled. CGI proposes that shot clocks would no longer be tolled while applications remain incomplete. Specifically, CGI proposes that incomplete applications would be subject to a three-day grace period where applicants could provide supplemental information without tolling the shot clock.[72] As explained in Smart Communities' Wireless Comments, communities routinely receive incomplete applications.[73] These applications require disproportionate attention and resources from local agencies that contribute to delays for other applicants. Creating a grace period for incomplete applications would simply encourage game-playing and lead to longer delays. Under CGI's proposal, applicants would have an incentive to submit applications in batches to receive multiple grace periods to slow "bleed" the shot clock. This perverse incentive would harm diligent applicants and divert local resources to monitoring these applications.

Third, commenters support creating separate shot clocks for small cells and processing batch applications. Commenters support shorter shot clocks for small cells based on the assumption that these facilities are less complex than macrocells or that traditional zoning processes are not applicable within the right-of-way. They assume batch applications will be easier to process due to the similarity.

These commenters are mistaken. Small cells, especially those within the right-of-way are not necessarily easier to process or review. As we pointed out in initial comments no one can seriously argue that the term "small cell" means "small physically" as opposed to "serving a small area."[74] Small cells may involve substantial amounts of equipment, including a support structure (ranging in size from a Mobilitie tower to a more conventional utility pole); an antenna;

[72] GCI Comments at 5-6.

[73] Smart Communities Wireless Comments at 31-32.

[74] Smart Communities Wireless Comments at 44.

radio units; power supplies/electric meters/disconnects/cabling; and potentially back-up power supplies.[75] These sites can approach or exceed the size of many monopoles or macrocells.[76] In addition, small cells locating within the right-of-way can present unique challenges, and in many ways, these applications are as, if not more, challenging that traditional macrocells. These facilities can raise significant issues for roadway engineering, safety, and coordination with other utilities.[77]

In addition, processing applications in batches does not warrant a shorter shot clock. Commenters suggesting that batch applications are necessarily easier to review gloss over the practical realities of most applications. While it may be possible to reduce review time for some aspects of batch applications (i.e., if the same design is used in the same zoning area, that design may be approved for the entire area), the majority of sites must be evaluated independently. This is especially true if applications within a batch are located on different structures (i.e., new poles vs. existing poles), differ in size or visibility and require coordination with other utilities (i.e., existing electric poles and underground utilities), and may require planning to avoid harming roadside trees and other vegetation .[78]

Lastly, some commenters, most notably Crown Castle, suggest that the Commission should reverse its decision and expand the scope of "eligible facilities" under Section 6409 to include all utility poles, whether or not they currently contain transmission equipment. Crown Castle suggests, "[w]hether the equipment is being collocated on a pole currently used for telecommunications services or one used for some other purpose is a distinction without a

[75] Smart Communities Wireless Comments at 44-45; CTC Declaration at 6.

[76] CTC Declaration at 6-8.

[77] Puuri Declaration at 2.

[78] As we pointed out in our comments, the new large poles proposed by Mobilitie required sinking a pole a substantial distance into the ground, but even placement of ordinary utility poles must be planned so that they do not interfere with sewer lines, water lines and storm sewer drainage. Smart Communities Wireless Comments at 44-47.

difference."[79] The plain language of the statute contradicts Crown Castle's assertion. Section 6409 (47 U.S.C. §1455) refers to actions affecting an "… existing wireless tower or base station that involves—(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment." The term "tower" has consistently been used to refer to a facility designed primarily to support a wireless facility; it would be stunning if Congress meant for the term to include every vertical structure. Likewise, the technical term "base station" could not sensibly be used to refer to structures that do not support wireless facilities. Setting aside the use of the term "existing," statutory references to "collocation," "removal" or "replacement" of equipment implicitly require that the tower or base station already contain transmission equipment. Indeed, the Commission has already considered this issue and rejected Crown Castle's strained interpretation of the statute.[80] Crown Castle fails to articulate any new or compelling reasons for disturbing this settled issue.[81]

C. The Commission Does Not Need To Address Moratoria.

A number of commenters suggested that it is necessary for the Commission to reiterate that the shot clocks run regardless of any local moratoria. For example, Crown Castle noted that seven communities recently imposed moratoria on wireless applications. Based on this, it urges the Commission to "reiterate that even temporary moratoria are prohibited barriers to entry."[82] Commenters also focused on concerns related to claimed "de facto" moratoria where

[79] Crown Castle Comments at 48.

[80] In the matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, ¶ 135 (rel. Oct. 21, 2014) ("2014 Infrastructure Order").

[81] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41–43 (1983).

[82] Crown Castle Comments at iv.

communities have failed "… to act on permit applications, and [other] interminable delays that can extend more than a year."[83]

For actual, legal moratoria, the existing Commission's rules are clear: that moratoria do not stop the shot clock. Any communities adopting moratoria are doing so to ensure that carriers do not obtain vested rights under state law. Any Commission admonishment or reiteration that moratoria do not toll the shot clock is unnecessary. For the asserted "de facto" moratoria, this is simply an attempt by industry commenters to erode the important regulatory and proprietary distinction. As explained in Section V.E.4(B), the Commission cannot require localities to lease public property to carriers. Those communities that wish to lease public property, including franchising use of the public right-of-way, are entitled to negotiate an arms' length transaction with carriers. This process is not a moratoria but the same process carriers engage in with property owners when seeking to lease private property.

V. THE COMMISSION SHOULD NOT PURSUE MORE DECLARATORY RULINGS OR RULEMAKINGS BASED ON QUESTIONABLE LEGAL AUTHORITY

A. The Commission Must Consider Communications Act Provisions In Context With The Rest Of The Statute

While the Commission undoubtedly has broad authority to adopt rules to fill "gaps" in the Communications Act,[84] that authority is not unlimited, and the scope of that authority must be interpreted in context. For example, Section 201(b)'s broad grant of rulemaking authority cannot be utilized to address infrastructure attachment without consideration of the general grant of authority to the Commission, which does not give the agency authority over facilities which

[83] CTIA Comments at 7.

[84] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012).

may be useful in the provision of telecommunications services[85] and the limits of Section 224, which grants limited authority over privately owned utility infrastructure, and carves out particular rights for classes of attachers to infrastructure. Similarly, the Commission cannot, as commenters in this proceeding suggest,[86] largely disregard Congress' clear intent to preserve a robust role for state and local governments in regulating the deployment of telecommunications services under either section 253 (leaving, for e.g. management of the public rights-of-way to localities) or section 332 (preserving authority over wireless deployments except for those regulations which are applied in a manner specifically prohibited), or more broadly.[87] Which is to say, general grants of authority to make rules cannot grant substantive authority where none exists, and cannot trump the clear protections of state and local authority in, *e.g.* Section 253, Section 332.[88] The Communications Act has been structured deliberately to preserve state and local authority, rather than to give the Commission complete authority over all aspects of service regulation, and more importantly for this proceeding, all aspects of deployment of communications equipment, or all facilities or property that may be used in connection with that deployment. This not only reflects a conscious choice as to the distinctions between interstate and intrastate authority, but also recognizes that the deployment of these facilities implicates proprietary, sovereign and police power interests of states and their subdivisions (as well as interests of private property owners that cannot be ignored consistent with the Constitution.[89]

[85] Smart Communities Wireless Comments at 11-14.

[86] T-Mobile Comments at 25-26; AT&T Comments at 7-12..

[87] *See* Telecommunications Act of 1996, Sec. 601(c)(1); *See also* Dissenting Statement of Commissioner Ajit Pai, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (2015); *Global TelLink v. FCC*, D.C. Cir. No. 15-1461 (Jun. 13, 2017).

[88] *See* Telecommunications Act of 1996, Sec. 601(c)(1).

[89] *See further Section V.D.*

B. Section 253 Does Not Permit The Commission To Engage In Rulemaking-Based Preemption

Contrary to the assertions of numerous commenters, the Commission does not have the authority to undertake rulemaking action pursuant to Section 253(d). Verizon argues, for instance, that the Commission may proceed either through adjudication or rulemaking, citing *City of Arlington*'s statement that "Agencies typically enjoy 'very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking.'"[90] While true as a general principle, Section 253(d) does not present a typical scenario. Unlike the majority of statutes governing the Federal Communications Commission, Congress explicitly outlined particular procedures for the application of authority under Section 253(d) which the Commission must follow. Notably, the statute clearly and unambiguously directs the agency to provide "notice and an opportunity for comment" of a particular "statute, regulation, or legal requirement that violates subsection (a) or (b)" before the agency may act to preempt those laws. This process is the very essence of an adjudication, rather than a general rulemaking, and the deliberate inclusion of 253(d)'s procedural language establishes that, unlike typical situations, the agency may *not* exercise discretion in deciding how to proceed under this Section.[91]

Verizon also erroneously seeks to bypass the clear language of Section 253(d) by arguing that, in any event, Section 201(b) of the Act empowers the Commission to enact rules preempting state and local laws. While generally true, suggesting that fundamental principles of statutory interpretation indicate that simply reading 201(b) as an alternative path and dismissing 253(d) out of hand is to suggest that Congress needlessly added that language to the statute. As a

[90] Verizon Comments at 31.

[91] *City of Arlington v. FCC*, 668 F.3d 229, 240 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013) ("Agencies typically enjoy 'very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking.'") (quoting *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001)) makes it clear that the general rule does not apply in all circumstances.

general matter, statutes are to be interpreted in their entirety, and where an interpretation of one section would render another section meaningless, that interpretation should be rejected. Verizon proposes to do the opposite, relying on *Brand X* to assert that, where the statute is ambiguous, Section 201(b) gives the agency authority to fill in the gaps with binding rules. The statute is not ambiguous here. If the Commission wishes to preempt state or local laws on the basis that they pose barriers to deployment of telecommunication services, the procedures of Section 253(d) must be followed.

Separately, AT&T argues that the Commission need not look beyond Section 253 to find a means to dispense with Section 253(d)'s unambiguous directives. AT&T maintains that Section 253(d) is, in essence, optional, and that it does not expressly or by implication suggest any limitation on the agency's ability to proceed with exercising 253(a) authority using 201(b) general rulemaking authority. AT&T's assertion fails for the same reason Verizon comes up short – their proposed interpretation of the governing statute effectively makes Section 253(d). Protections intentionally built into Section 253 by Congress (including the omission of Section 253(c), and the requirement that any preemption be as narrow as possible) would disappear if the section could be bypassed altogether. To dismiss the guiding statute and the express words of Congress in this manner falls well outside the deference any agency might hope to enjoy.[92] That is particularly so because Section 253 and Section 332(c)(7) were adopted as part of the Telecommunications Act of 1996, and that Act itself limits the authority of the Commission to use its general powers to supersede state laws. Section 601(c) of the Act provides:

> (c) FEDERAL, STATE, AND LOCAL LAW-
>
> (1) NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal,

[92] AT&T Wireless Comments at 69-71.

> State, or local law *unless expressly so provided* in such Act or amendments.
>
> (2) STATE TAX SAVINGS PROVISION- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

In this case, the general provisions of Section 253(a) are subject to a specific procedural provision titled "preemption," and to imply that Congress meant to grant the Commission unlimited authority to draw upon other provisions to limit local authority is inconsistent with this express directive.

CTIA appears to suggests that delay in processing a wireless application can rise to be an "effective prohibition" under Section 253.[93] As explained below, Section 253 simply does not apply to wireless applications, and CTIA's comments merely underscore why that is so: Section 332 sets out the only permissible time limitation on local action on an application to site a wireless facility, and making the time subject to an additional Section 253 requirement cannot be squared with the plain language of Section 332. Moreover, even assuming that Section 253 does apply, delays that would be related to managing the rights of way in a non-discriminatory manner, or in ensuring that facilities installed subject to appropriate safety standards would fall within the safe harbors of Section 253(b) and (c), and CTIA's own formulation (delay can amount to an effective prohibition) suggests that the reverse is also true. Because the existence of the prohibition may depend on facts; and because even if prohibitory, the action may be permissible, a blanket deemed granted remedy is not permissible consistent with Section 253(d).

[93] CTIA Wireless Comments at 12.

A blanket deemed granted remedy reaching lands owned by a state or its subdivisions is not available for another reason. Section 253 is only a preemptive statute: it does not give the FCC authority to grant property rights to any entity. The ability of a state to control its own property is the essence of sovereignty; the federal government is not given broad authority to control state lands, and only limited authority over lands that it owns, US Const. Art IV Clause 2. This is not a case where Section 253 provides an opportunity for the State to participate in a federal regulatory program in return for following federal standards; commenters, through the deemed granted remedy, are asking that the FCC grant them property interests in, or access to, sovereign lands of the state. Even if permissible, given the impact on state sovereignty of allowing a federal administrative agency to grant rights in stated land, *Pollard's Lessee v. Hagan*, 44 U.S. 3 How. 212 212 (1845) the right would need to be quite specific, and it is not.

C. Numerous Commenters Agree That The Commission Cannot Exercise Title II Authority To Preempt Local Governments If It Reclassifies Broadband Internet Access Service As A Title I Information Service.

As Smart Communities explained in detail, "Sections 253 and 201 . . . would not apply to broadband Internet access service if the Commission were to reclassify the service."[94] A variety of industry commenters who oppose classification of broadband Internet access service as a Title II telecommunications service nevertheless seek to benefit from Title II's provisions where it suits their interests.[95] T-Mobile urges the Commission to act immediately to "close the loophole that might open" if the Commission moves forward with its Restoring Internet Freedom proposal.[96] T-Mobile is wrong to assert, however, that the Commission can simply "clarify that Sections 253 and 332 apply to 'mixed-use' facilities" and subsequently disregard the clear

[94] Smart Communities Wireline Comments at 6.

[95] AT&T Wireless Comments at 69-71; T-Mobile Comments at 52.

[96] T-Mobile Comments at 52.

language of the statute.[97] Section 253 explicitly refers to "telecommunications services," and the D.C. Circuit has already rejected arguments analogous to T-Mobile's, as discussed in Smart Communities' original comments.[98] CCA offers similar arguments in its comments, in an apparent effort to enjoy the benefits of common carrier status while vigorously objecting to any accompanying obligations or limitations.[99] Statutorily, however, local and state authority are prescribed under Section 253 only to the extent that they prohibit the provision of telecommunications services; they are not proscribed to the extent that they prohibit the provision of non-telecommunications services. Likewise, under Section 332, a regulation of the placement of wireless facilities is only preempted if it prohibits or effectively prohibits the provision of common carrier services (as all personal wireless services are by definition common carrier services.).[100] The issue is not whether a facility has a *mixed use*; it is whether the regulation has the specifically required effect. Hence, for example, if a wireless provider can offer its common carrier services via existing facilities, it cannot demand the right to place additional facilities in a manner inconsistent with existing state and local codes.[101]

Numerous other commenters share Smart Communities' view on this matter, as well. We agree with Public Knowledge that "this proceeding relies on legal authority only available to the extent that broadband internet access remains classified as a Title II telecommunications

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[97] *Id.*

[98] Smart Communities Wireline Comments at 6.

[99] CCA Comments at 23-24

[100] *See* 47 U.S.C. § 153(24) (definition of information service; 47 U.S.C. § 153(53) (definition of telecommunications service).

[101] The issue, we stress, is one of the limits of the Commission's preemptive authority, in light of the specific language of Section 332(c)(7) and Section 601. Localities are seeking ways to ensure that broadband is deployed throughout their communities; but the question before the Commission is whether deployment can be compelled where not required for the provision of common carrier services.

service."[102] Public Knowledge correctly notes that the statutory language of Section 253 is clear: the Commission may only exercise that authority in relation to telecommunications service, not information services.[103] The League of Arizona Cities and Towns, League of California Cities, and League of Oregon Cities also recognize this issue, pointing out that the Commission "makes no bones about its desire to reclassify broadband as an information service."[104]

Finally, the Commission must recognize and respect the striking logical inconsistency inherent in seeking to exercise Title II authority over, and in furtherance of, broadband internet access service, while simultaneously attempting to remove that service from its Title II jurisdiction. As the AZ-CA-OR Leagues of Cities note, "these simultaneously-held inconsistent positions would undermine any 'rational connection between the facts found and the choice made.'"[105]

D. There Is No Basis For The Industry's Broad Interpretation Of What Is Regulatory As Opposed To Proprietary Action

1. *Industry Commenters Correctly Acknowledge That Publicly Owned Property Outside The Public Right-Of-Way Is Proprietary.*

While industry commenters argue that public rights-of-way and municipally owned property within public rights-of-way are non-proprietary (an argument with which we do not agree as discussed below), they at least acknowledge that Sections 253 and 332 in general do not apply to property owned by public agencies, such as buildings and parks.[106] For example, T-

[102] Public Knowledge Comments at 13.

[103] Public Knowledge Comments at 14.

[104] Conterra-Southern Light-Uniti Comments at 1

[105] *Id.* at 2

[106] *See, e.g.*, T-Mobile Comments at 49; Crown Castle Comments at 49. This view is perhaps not fully shared by AT&T, which in its Wireline Comments , cited an 1880 Supreme Court decision, *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880), which stated that a municipal corporation "[i]n its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings … has no proprietary rights distinct from the trust from the public." AT&T Wireline Comments at 72, FN203.

Mobile notes cases in which the courts found a public agency's management of the placement of antenna on a school roof and in a city-owned park to be proprietary functions.[107] This view is consistent with statutory and constitutional principles and cannot be impeded.

2. *Commenters Incorrectly Urge The Commission To Determine All Public Right-Of-Way Decisions Are Regulatory*

Industry commenters request the Commission reverse long-standing policy and determine that the public right-of-way and access public facilities (i.e., lightpoles) within the public right-of-way are regulatory, not proprietary, decisions. Commenters articulate three reasons for this dramatic change: (1) the public right-of-way is an ideal place for small cell and similar facilities, (2) the regulatory/proprietary can be disregarded because the term "proprietary" does not appear in Sections 253 or 332 and (3) the public right-of-way is held in public trust for the provision of public service. Each of these reasons is insufficient, and the Commission must respect the property rights of local agencies by rejecting the requested change.

(i) Convenience For Carriers Is Not A Sufficient Reason To Change Policy

Commenters suggest that the Commission should clarify that access to the public right-of-way and facilities within the public right-of-way is a regulatory decision because the public right-of-way is a convenient and easy place to locate facilities.[108] For example, CCIA notes that, "Facilities in ROWs, like light poles, traffic light signals and poles, utility poles, and equipment cabinets usually have the necessary infrastructure for wireless service … Put simply, siting facilities in ROWs is effective and could be a more expeditious way of building out a network …."[109] Smart Communities does not necessarily disagree that placing facilities in the

[107] T-Mobile Comments at 49, citing *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 419-21 (2nd Cir. 2002) and *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200-201 (9th Cir. 2013).

[108] *See, e.g.* T-Mobile Comments at 49-50; AT&T Wireless Comments at 11-12.

[109] CCIA Comments at 12.

public right-of-way is convenient for carriers. However, this is insufficient reason for the Commission to reverse long-standing policies respecting the rights of local agencies to control their property.

Localities must ensure that the placement of wireless facilities by wireless providers does not interfere with the primary use of the rights of way – which is for transit by vehicles and pedestrians, including persons with disabilities whose use of the rights of way would be blocked by the placement of the sorts of facilities actually proposed by wireless providers. Similarly, adjacent property owners have interests that may require protection. In addition, government agencies are themselves seeking to deploy equipment that will be used to speed traffic flows, and enhance public safety. They have an interest in ensuring that those systems may be deployed cost-effectively, and without interference. Local governments are not the only parties to recognize the significance of these policy considerations. The Communications Workers of America (CWA) has urged the Commission to "act with extreme caution in considering preemption of state and local government authority to manage and to receive fair and reasonable compensation for use of public rights-of-way, authority granted in Section 253(c) of the Act."[110] As CWA explained, "State sovereignty is a core principle in our federal system."[111]

Moreover, the very point of the argument concedes that in most, if not all instances, there are alternatives to the placement of wireless facilities in the public rights-of.way. Under the strict statutory and constitutional limitations on the Commission's authority, discussed below, convenience is not enough to justify intrusion on local authority.

[110] Comments of the Communications Workers of America, WC Docket No. 17-84, at 24-27 (Jun. 15, 2017) ("CWA Comments").

[111] *Id.* at 24.

(ii) The Fact That "Proprietary" Is Not In Statutory Language Is Irrelevant

Some industry commenters argue that the regulatory/proprietary distinction is illusory and may be disregarded because Section 253 and 332 do not actually contain the term "proprietary." As an example, AT&T notes, "this distinction finds no support in the text of Sections 253 or 332, which do not use the term 'proprietary.'"[112] That term may not be used *per se*, but the sections – and particularly section 332 contain other words which do foreclose the interpretation urged.

We begin with the proposition that the Commission has ruled on the issue raised by commenters, and a decision by the Commission to reverse its established policy to respect public property rights would be subject to more specialized judicial review.[113] Specifically, the Commission must adequately explain the reason for its change and must take into account legitimate reliance on prior interpretation.[114] Here, it has always been convenient to locate facilities in the public right-of-way. Commenters have not articulated several reasons to deviate from established Commission policy.

The courts have uniformly recognized that there is a meaningful difference between regulatory/proprietary actions under the Telecommunications Act of 1996 that is of Constitutional dimension.[115] While the Commission has the authority to preempt regulatory actions, preemption by definition does not reach non-regulatory actions.[116] That distinction is

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[112] AT&T Wireless Comments at 11.

[113] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41–43 (1983).

[114] *Smiley v. Citibank (s.D.), N.A*, 517 U.S. 735, 49 (1996).

[115] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes").

[116] *Id. Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993).

compelled by the statutes that are the primary focus of this proceeding. Section 332(c)(7) "…indicates that Congress meant preemption to be narrow and preservation of local governmental rights to be broad, for subparagraph (A) states that 'nothing' in the [the Telecommunications Act of 1996] affects the "authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities" 'except as provided in this paragraph.'"[117] 47 U.S.C. §332(c)(7)(A) (emphases added). Section 332(c)(7) then draws a line between regulatory and other actions. requiring that the "regulation" of the "placement, construction, and modification" of wireless facilities meet certain standards. [118] The fact that the statute does not use the term "proprietary" is irrelevant – the clause that empowers any intrusion explicitly refers to the regulatory functions of governments.

The argument is no stronger with respect to Section 253. Section 253 has no application to wireless facilities at all, so the issue is whether Section 253 prohibits proprietary control generally. As an additional argument in support of the incorrect premise that proprietary considerations are irrelevant, some industry commenters argue that the "legal requirement" language in Section 253(a) must be construed to conclude that this section applies to all exercises of governmental authority.[119] That is not the case, and reliance on the *Minnesota* case is misplaced. In *Minnesota,* the state sought a declaration that a program under which it would provide one entity the right to place fiber within certain limited access roads was affirmatively permitted under Section 253. Without deciding the issue, the Commission essentially ruled that the answer to the question depended on a variety of factors, including how the program worked.

[117] *Sprint Spectrum, supra,* 283 F.3d 404, 421.

[118] *Id.*

[119] Crown Castle Comments at 28-29 (citing "State of Minnesota," 14 FCC Rcd 21697, 21705); *see also* WIA Comments at 61-62.

It concluded that "legal requirements" could include contractual provisions that had the same effect as a law that created exclusive rights in one entity. The point was explained in the Amigo.net case:

"To make this determination, we focus on the contract's effect on the provision of telecommunications service – that is, whether the contract imposes a requirement that has the effect of prohibiting the provision of any telecommunications service. The Commission has indicated that a state could impose, as part of a contract to obtain telecommunications services, the type of legal requirement proscribed by section 253. The simple act of forming a contract, which typically excludes from its provisions all entities not party to the contract, does not necessarily implicate section 253, however. The Commission has drawn a distinction between a contract in which the state was "merely acquiring fiber optic capacity for its own use" and a contract in which the state was granting its contract partner exclusive access to freeway rights-of-way, which other carriers would need in order to provide fiber optic services. In this latter instance, the Commission found that the state's contract might impose a legal requirement that would have the effect of prohibiting the ability of other carriers to provide service."[120]

In other words, the proprietary/regulatory distinction is not eliminated, even as to rights of way; what is subject to challenge are contract terms that effectively prevent a state from making resources required by wireline providers available to others. What is requested here, however, is far different, and far more expansive, and essentially requires the Commission to read Section 253's legal requirements provision to forbid the right to deny access to public or

[120] *In re* Amigo.net, 17 F.C.C. Rcd. 10904, 10967.

private property altogether, except as the Commission may permit. The law does not bear that weight.[121]

3. *A BLANKET, ONE SIZE FITS ALL APPROACH IS INAPPROPRIATE.*

(i) Establishing a Blanket Declaration or Rule That All Right-of-Way Management is Regulatory Would Ignore The Distinct and Diverse Nature of Local Conditions.

The industry's desire for a one-size-fits-all declaratory ruling that states and localities are not acting in their proprietary capacity when acting on requests to place facilities on public rights-of-way or municipal poles would ignore an important reality — the wide diversity in local conditions that must be considered by States and local governments in adequately managing their public rights-of-way and property within public rights-of-way. A wide range of demographic, geographic, climate, aesthetic, and other considerations exist from place to place across the country. Because of these variations, different agencies would necessarily have different needs and requirements when leasing their public rights-of-way and municipal poles and infrastructure within public rights-of-way. As discussed in Smart Communities' Opening Ccomments, public agencies, including cities, counties and special districts, must retain control of their property to preserve the condition of the property and its financial value, to ensure daily government operations run smoothly, to provide services such as water, sewer, fire protection, parks and recreation and flood control, and to protect against security breaches that could harm their operations and the public. These goals often must be accomplished while grappling with

[121] Section 253 does not just reach public property – it actually reaches laws and "legal requirements" regardless of the type of property to which those might apply. Hence, to read 253 to authorize the Commission to preempt laws requiring payments of rents, costs and the like, or to read Section 253 to preempt laws that require authorizations from a property owner before property can be occupied in effect reads 253 as an authorization to require dedication of public and private property to telecommunications uses. The law cannot constitutionally bear that weight. *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

budgetary and staffing limitations.[122] When considering whether or not placement of third party facilities on their property can be accomplished without risk to the public safety and welfare, they must be able to take into account unique and highly sensitive safety and operational issues and their limited resources.[123] *Requiring* local governments or special districts to make facilities available, or to administer a federal program, would impose an undue burden on them and the public they serve.

Thus, any question about whether a State or local government is acting in violation of Section 253 must be addressed on an individual, case-by-case basis preemption analysis and determination.[124]

The *Qwest Corp. v. City of Portland* case[125] illustrates the significance of this consideration. In this case, ten cities were involved in the litigation, each with unique franchise agreements and ordinances being challenged by Quest.[126] The district court concluded the cities' agreements and ordinances were not preempted by Section 253.[127] The appellate court, however, reversed and remanded, in part because the district court had failed to conduct an individualized preemption analysis of each city's challenged ordinances.[128] The court emphasized that such a generalized conclusion "is not conducive to effective review on appeal."[129] Here, the industries urge the Commission to form a generalized conclusion with a sweep that would include 50 states

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[122] Smart Communities Wireless Comments at 65-69.

[123] *See* Smart Communities Comments at 68 (water districts must ensure sensors, gates, lighting and other security measures are not disturbed by third parties to protect the public clean water supply; access to property of fire protection district must be strictly controlled on a case-by-case basis to prevent interference with vital services).

[124] *Quest Corp. v. City of Portland*, 385 F.3d 1236, 1242 (9th Cir. 2004), overruled on other grounds in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571.(9th Cir. 2008).

[125] *Quest Corp. v. City of Portland*, 385 F.3d 1236, 1242 (9th Cir. 2004).

[126] *Id*. at 1240.

[127] *Id*. at 1242.

[128] *Id.*

[129] *Id*. at 1240.

and countless cities, counties, special districts and other local governments. It cannot do so consistent with the statute.

a. ***Industry Arguments Urging A Blanket Preemption to Limit Compensation for Use of Public Rights-of-Way Ignores and Would Contravene Constitutional Principles.***

(1) ***Limiting State and local ability to set compensation for use of public rights of way would raise serious Fifth Amendment concerns.***

In their initial comments, Smart Communities explained that the statute does not grant the Commission authority to set rates, and at most permits a court to preempt a local or state law related to charges if the charges fall outside a zone of reasonableness, which by definition permits rates that recover all costs and the market value of the property to be used; and if the charges actually prohibit the ability of some entity to provider service. Nonetheless, some commenters continue to ask the Commission to set rates at out-of-pocket, incremental costs or to limit charges associated with right of way use (such as permitting charges) to a fixed amount regardless of cost incurred in connection with the use of property.

Of course, if the federal government were to require a local government to place a wire on its property without compensation, it would constitute an unlawful taking under the Fifth Amendment.[130] The Supreme Court has clearly recognized a local government's "right to exact compensation" for such property uses:

> [W]hile permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which

[130] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 433 (1982) (state law requiring property owner to permit access to cable company to install lines on private property constituted a taking).

> the giver has a right to exact compensation, which is in the nature of rental.[131]

And the Court has also held that like private property owners, local governments have the same right to fair market value compensation for the federal government's taking of property as private property owners.[132] It matters not that the intrusion may be relatively slight:

> [P]ermanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.[133]

Reading the Act to both compel the government to provide access and to allow the Commission to limit compensation would create significant takings issues.[134]

b. *Interfering with local public right-of-way management practices would raise serious issues under the Tenth Amendment and the Guarantee Clause.*

The preemption of local public right-of-way management practices would offend the Tenth Amendment and the Guarantee Clause of the Constitution. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[135] As part of the system of "dual sovereignty," the federal government "may not compel the States to enact or enforce a federal regulatory program."[136] Even in areas where the federal government has authority to act, the

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[131] *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 99 (1893), *op. on rehrg.*, 149 U.S. 465 (1893); *see also Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) ("Franchise fees are . . . essentially a form of rent: the price paid to rent use of the public right-of-ways.").

[132] *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

[133] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 430 (1982).

[134] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

[135] U.S. Const. amend. X.

[136] *Printz v. United States*, 521 U.S. 898, 918-19, 933 (1997) (*quoting New York v. United States*, 505 U.S. 144, 166 (1992)).

Constitution only authorizes the federal government to regulate individuals, not States.[137] If the Commission were to assert control over public right-of-way practices or compel local governments to provide access to public rights-of-way on federally-prescribed terms, the Commission would unconstitutionally commandeer the local administration of public property in service of a federal regulatory program. Here, it is important to distinguish the situation in which the Commission imposed a deemed granted remedy that only applies in situations where a government entity had already made a voluntary choice to regulate wireless services — in which case it could then be required to regulate in accordance with a valid federal scheme.[138] In the case of access to property, there is no preliminary choice to be made; an affirmative action is always required because, as a matter of law, no person has a right to occupy the property of another without the owner's permission.[139] In effect, the choice the commenters urge the Commission to give to State and local governments is the choice between granting access to property without conditions, or granting access subject to the conditions the Commission may prescribe. That is no choice at all.[140]

The preemption of local discretion regarding how to manage of its property also raises concerns under the Guarantee Clause.[141] The Guarantee Clause precludes the federal government from interfering with a State's distribution of power among the various levels of government.[142]

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[137] *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

[138] *Montgomery County v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015).

[139] *FCC v. Fla. Power Corp.*, *supra*, at p. 253 (Property law "has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property.")

[140] *New York v. United States*, 505 U.S. 144, 176 (1992) (two choices in take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 constituted "no choice at all" because "[e]ither way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'").

[141] U.S. Const., Art. IV, § 4.

[142] *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").

Where a State has decided to allow local governments to obtain certain fees, the Commission may not undermine the State's decision by leaving the local government without a means to recover that compensation. While the Federal government may use its Commerce Clause authority to limit certain actions of State and local officers, it may not—consistent with the unqualified *guarantee* to the people of the States of "a Republican Form of Government"—curtail the fundamental powers or property rights of local governments as local governments.

E. Industry's Laundry List Of Requests For Action Pursuant To Sections 253 And 332 Are Rife With Problems

On issues related to effective prohibition in the context of Sections 253 and 332(c)(7), industry commenters largely repeat arguments made in the *Mobilitie* docket. Smart Communities' comments in the *Mobilitie* docket addressed the arguments raised in that proceeding, and as the Commission will see, Smart Communities' comments in these proceedings to a large degree anticipated and responded to arguments raised by industry commenters here.

1. The Commission Should Not Harmonize The Interpretations Of "Prohibit Or Have The Effect Of Prohibiting" In Sections 253 And 332(C)(7)

The industry asks the Commission to "harmonize the interpretations of "prohibit or have the effect of prohibiting" in Sections 253(a) and 332(c)(7) by applying its current interpretation of Section 253 to both statutory provisions.[143] Smart Communities argues that harmonization can only go so far, and in this case, harmonization makes very little sense.

Statutorily, both Sections 253 and 332(c)(7) use the term "effective prohibition," but Section 332(c)(7) only reaches "regulations" that effectively prohibit the provision of "wireless services," while Section 253 reaches laws and statutes that prohibit or effectively prohibit the

[143] Verizon Comments at 10.

ability of any entity to provide telecommunications services. In the former instance, the test can thus be focused on what would actually result in a prohibition of wireless service, while in the latter, what is a prohibition may be far more difficult to generalize.

The significant gap test recognizes that by its very nature, there are always gaps in wireless coverage, but those gaps do not prevent anyone from providing wireless services *per se*. On the other hand, courts have reasoned that if the coverage gaps are large enough, and involve high traffic areas that lack service from a provider (e.g., highways), the gap amounts to enough of an impairment to constitute a prohibition. While that test will no doubt evolve, it will only add to confusion – and raise questions about how the law applies – if one seeks to "harmonize" the standards to create a generalized test that applies to both wireline and wireless.

2. Contrary To Industry Claims, Only Requirements That "Prohibit Or Have The Effect Of Prohibiting" May Be Preempted

Verizon urges the Commission to define "effective prohibition as a regulation or action that "(1) significantly increases a carrier's costs; or (2) otherwise meaningfully strains the ability of a carrier to provide telecommunications service."[144] Verizon, in particular, cites to the *Puerto Rico Tel. Co. v. Guayanilla* case to argue that "because of the cumulative effect of ordinances and actions of multiple localities that limit carrier access to rights-of-way, the Commission should make clear that carriers can demonstrate that local requirements significantly increase costs, or otherwise meaningfully strain their ability to provide service, by showing the effect of numerous municipalities employing similar restrictions."[145]

Verizon suggests the First Circuit's ruling in *Guayanilla* supports its proposed standard that a local regulation has the "effect of prohibiting" where it "(1) significantly increases a

[144] *Id.* at 11.

[145] *Id.* at 12.

carrier's costs; or (2) otherwise meaningfully strains the ability of a carrier to provide telecommunications service."[146] It is not clear what the standard proposed by Verizon actually means — it appears to be the result of editing the decision of the First Circuit to create a standard that the First Circuit never actually adopted.[147] As far as it appears, the First Circuit was attempting to apply the standard proposed by Smart Communities, and reflected in the decisions of the Eighth and Ninth Circuits. Nor does *Guayanilla* actually support the "cumulative impacts" test proposed by Verizon, or a limitation of fees to costs. *Guayanilla actually supports fees in excess of costs.* In *Guayanilla* the problem was that the community could not support a claim that its charges even reflected the market value of the property used; rather, the community simply argued that the charges were inconsequential since they were small considering all the revenues that the provider obtained from *other* communities. The court's decision simply rests on the uncontroversial provision that if one wishes to measure impacts based on revenues from other

[146] *Id.* at 11.

[147] Verizon Comments at 11. (*Guayanilla*, 450 F.3d 9, 19 (1st Cir. 2006) found that it constituted an effective prohibition because it would "negatively affect [the provider's] profitability;" give rise to "a substantial increase in costs for [the provider];" and "place a significant burden on [the provider]," thereby "strain[ing the provider's] ability to provide telecommunications services."). Not only is the Commission barred from adopting Verizon's proposal, but Verizon is incorrect in its interpretation of *Guayanilla* supports a broad rule which would be met if a rule "increased a carrier's costs." This interpretation would be inconsistent with the Supreme Court's interpretation of the Act's language: the Court interpreted the word "impair" under the Communications Act to require more than a showing of an increase in costs, *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389-390 (1999). In *Iowa Utilities Board*, the Commission defined the term "impair" in a way designed to ensure companies could enter the market more easily to compete with incumbents by obtaining access to incumbent facilities. But the use of the term "impair" was meant to limit the circumstances under which a competitor could obtain access to incumbent facilities, and the Supreme Court found it was the Commission's duty to define "impair" in accordance with its ordinary meaning, and not simply to do whatever the Commission felt would best promote statutory goals. (*Iowa Utilities Board*, 525 U.S. at 389-390; *see also Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014)) The Court found that the mere fact that it might be more convenient for a competitor to enter the market under the Commission's rules was not a sufficient justification for the approach taken. (*Iowa Utilities Board*, 525 U.S. at 409) Thus the more-absolute term under the Act—effect of "prohibiting"—would require a telecommunications company complaining about a local requirement to show much more than that the local requirement increases its costs – even if doing so created a "strain" on the company. Moreover, Verizon is wrong to suggest a new test based solely on the facts in *Guayanilla* because under the facts of that case, the court accepted as given the untested assumption that the provider would see an 86 percent decrease in profit. Such a unique factual scenario is inappropriate for a generalized test to replace the widely-accepted *California Payphone* test.

communities, one must also consider the impact that would follow if the same fees were charged for use of public property in those communities.

At the outset, Smart Communities notes that what are at issue legally are prohibitions and effective prohibitions, and not hindrances or impediments, as the Commission seems to suggest in its Notice in the *Mobilitie* docket, or as CTIA suggests in its comments in this proceeding.[148] As we pointed out in initial comments, the term "prohibit" is not defined in the Act, but it has an ordinary meaning: to formally forbid (something) by law, rule, or other authority; or to "prevent, stop, rule out, preclude, make impossible." A mere "hindrance" "is simply not in accord with the ordinary and fair meaning" of the term prohibit,[149] and can provide no basis for additional Commission intrusions on local authority over wireless facilities (under Section 332) or wireline facilities (under Section 253). Much of what industry commenters (such as Mobilitie) complain about is a "hindrance" at most (and usually a hindrance magnified by its own actions).

Verizon goes so far as to suggest that several Circuits courts treat actions that "may prohibit" as violations of Section 253; that the Eighth and Ninth Circuits have incorrectly interpreted the statutory standard; and incorrectly claim the Commission has authority to overturn these cases pursuant to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), and to declare that even *potential* prohibitions violate Section 253.[150] In fact, the Circuits are not in conflict: they have not recognized that what the act reaches are prohibitions, or laws and regulations that have the effect of a direct prohibition. The Eighth and Ninth Circuits decisions are explicitly based on the plain language of Section 253 where the Commission receives no *Chevron* deference. Moreover, these interpretations are consistent with

[148] CTIA Comments at 44.

[149] *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[150] Verizon Comments at 10, FN33, 15, FN52.

California Payphone so there is no need to clarify anything.

3. No Further Interpretation Of Section 332(c)(7)'s Effective Prohibition Standard Is Necessary

Industry commenters also urge the Commission to reject the "significant gap" standard that courts have articulated in Section 332 cases, primarily because they argue installations are now addressing capacity and not coverage.[151] Some of them are proposing reinterpreting the standard.[152] AT&T and CTIA fail to mention that commenters and the Commission itself agree that most courts, not "some courts" as they claim, have come to a common interpretation of Section 332(c)(7): "[c]ourts generally agree that a carrier may establish that a land-use authority's denial of its siting application 'prohibits or has the effect of prohibiting' the provision of service by showing that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities."[153] According to the Commission and industry commenters (e.g., CTIA), the courts have not necessarily developed consensus "about the showings needed to satisfy this standard."[154] However, the application of a legal standard to facts is the precise scenario where case-by-case decision-making is required—not general standards or prescriptive national rules. Localized zoning decisions and their real-world impacts on provider offerings are well-suited to district court proceedings to ascertain facts and apply relevant legal

[151] AT&T Wireless Comments at 10; WIA Comments at 38; CTIA Comments at 21. In its section addressing the significant gap test, CTIA claims, without any explanation, that "regulations that police the technology or service the provider seeks to deploy are clearly preempted by the Commission's plenary jurisdiction under Title III of the Communications Act to regulate the licensing and operation of radio facilities." (CTIA Comments at p. 27) CTIA is mixing apples with oranges. Title III regulation of licensing and operation of radio facilities is separate from the factors that go into siting an actual facility (e.g., the least intrusive means test), which is under local authority. The Commission's authority under Title III to regulate licensing and operation of radio facilities does not preempt local siting considerations.

[152] Verizon argues that should the Commission find that the "significant gap" standard is in fact the proper standard, then it should alter the standard so that a "significant gap" is a gap in an ever-increasing quality level of service. Verizon Comments at 18, FN56.)

[153] Public Notice at 10 (WT Docket No. 16-421); Verizon Mobilitie Docket Comments at 21.

[154] Public Notice at 10 (WT Docket No. 16-421); Verizon Mobilitie Docket Comments at 21. See also CTIA Comments at 21.

standards.[155]

4. The Commission Should Not Adopt Or Rule In Favor Of Industry's Proposals That Certain Local Practices Are Effective Prohibitions

a. *Compensation For Use of The Public Right of Way Should Be Priced at Fair Market Value*

The industry argues that the Commission should limit public right-of-way fees to recovery of actual and reasonable costs for processing applications and managing the public rights-of-way.[156] The industry also argues that the Commission should clarify that "fair and reasonable compensation" under Section 253(c) means charges that enable a local government to recoup the costs reasonably related to reviewing and issuing public right-of-way permits as well as incremental public right-of-way management costs associated with adding a new wireless facility and applied equally to all public right-of-way users.[157]

First, Smart Communities has shown in its comments that (1) the Commission does not have the authority to regulate these charges, much less require local governments to effectively subsidize applications; (2) there is a significant expense associated with reviewing the applications that needs to be recovered; and (3) that allowing localities to recover costs and obtain fair market value for property used will actually enhance deployment, and ensure that

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[155] If the Commission wished to address the different standards, the standard that is better suited may be the one laid out in *360 Degrees Communs. Co. v. Board of Supervisors of Albermarle County*, 211 F.3d 79, 86-87 (4th Cir. 2000). In that case, the court held that neither Section 253 nor Section 332(c)(7) ensures that a provider will never have a service gap. (*Id.*) The court stated, "The Act obviously cannot require that wireless services provide 100% coverage. In recognition of this reality, federal regulations contemplate the existence of dead spots." (*Ibid.*) The court also noted that the broader inquiry indicated by Section 332(c)(7) is: "Does the denial of a permit for a particular site have the effect of prohibiting wireless services?" (*Id.*) The court held that "this statutory question requires no additional formulation and can best be answered through the case-by-case analysis that the Act anticipates." (*Ibid.*; citing *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423, 428-429 (4th Cir. 1998). Smart Communities recognize that in some cases capacity shortages can amount to a prohibition (as where the absence of capacity results in dropped calls) without adopting a term "capacity" or a new standard that has no obvious tie to the Act. Notably, no cases are identified where the existing standards somehow results in a prohibition that a court simply did not recognize.

[156] Verizon Comments at 14-15; T-Mobile Comments at 31-33; AT&T Wireless Comments at 17.

[157] Verizon Comments at 14-15; T-Mobile Comments at 30-33.

advanced systems are deployed in a rational way. More generally, the arguments conflate the right to recover costs associated with management,[158] with the right to recover compensation, which is viewed as a "rent" for use of property that does not belong to the applicant.

Verizon suggests that "market forces" are sufficient to ensure reasonable rates in a competitive market, but it goes on to argue that such forces are not present when it comes to access to public rights-of-way because local governments have "monopoly control" of public rights-of-way and municipally-owned structures.[159] The proposition that a local government would exercise monopoly power and charge supra-competitive rates for public right-of-way access — even if it had such monopoly power—is *ipse dixit,* and nothing more. The only record evidence — the evidence submitted by Smart Communities – is to the contrary. Local governments compete vigorously with one another to attract and encourage deployment of advanced and reliable utilities that will in turn attract and support new industrial, commercial, and residential development. This is a strong incentive not to overprice right-of-way access.[160] In some cases where companies are claiming that they are being overcharged, the charges were proposed by the companies themselves, under contracts that they helped to draft.[161]

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[158] Management costs may include initial engineering review, but also ongoing inspections and administrative reviewed. For example, while Crown Castle was required to inspects its facilities after its installations caused massive destruction to properties in Malibu Canyon, there would be a cost associated with reviewing the work done by Crown Castle, and those costs are properly borne by Crown Castle. It may be that these costs will prove to be quite high in some areas, but it is both appropriate as an economic matter, and permissible under the law to recover all of those costs.

[159] Verizon Comments at 14.

[160] ECONorthwest Report at 22.

[161] *See, e.g., Petition by Level 3 Communications LLC,* WC Docket No. 09-153. In that case, the New York State Thruway Authority entered into a contract that provided access to NYSTA rights of way and facilities and allowed providers to make use of those facilities, including the right to enter and exit the property at specified points. Several providers, including Level 3's predecessor, agreed to that contract. Subsequent to entering into that contract, Level 3 asked for additional exit points—unique treatment—and the NYSTA agreed to amend the contract after negotiations on terms similar to those proposed by Level 3, which reflected the value of the special rights sought, and the nature of the limited access roadway. Level 3 now asks the FCC to upset the agreement many years after it was executed. But doing so will only discourage future innovative arrangements for use of government property.

Verizon also argues that the legislative history of the Telecommunications Act supports a cost-based limitation under Section 253.[162] Verizon states that "Senator Feinstein made clear in a floor statement that Section 253(c) would permit a municipality to "[r]equire a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation." First, this excerpt is from a letter written by Louise H. Renne, City Attorney for the City and County of San Francisco that Senator Feinstein asked to be printed in the record. This excerpt was provided as an example of a routine requirement imposed by local governments in exercise of their responsibility to manage the public rights-of-way that communications companies would challenge under Section 253(d) on the grounds that it interfered with their schedules or convenience. It conflates the right to compensation, with the right to recover costs associated with management. As Smart Communities explained in its initial comments, the latter is often a function of the police power, and limited to cost, while the former is not. Secondly, the excerpt regarding management costs was only part of the debate over Section 253. While management costs certainly should be recovered, neither the Renne letter or other parts of the legislative history suggests that these were the only charges permitted.[163] Congressman Barton, one of the key architects of what became Section 253(c) noted:

> [The amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way. . . . The Chairman's [Manager's] amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has

[162] Verizon Comments at 15.

[163] 141 Conf. Rec. H8460 (1995) The Barton-Stupak amendment was proposed as an alternative that would have required localities to charge the same rate to every provider – the so-called "parity" amendment. That amendment was resoundingly rejected. But even the Barton-Stupak amendment's opponents indicated that they did not intend to limit localities to recovery of costs. For example, Representative Schaefer acknowledged that local governments were already entitled to freely charge for rent; the parity amendment, he suggested, merely required them to charge each provider on an equal basis: "The bill philosophy on this issue is simple: *Cities may charge as much or as little as they wanted* in franchise fees. As long as they charge all competitors equal, the [Barton-Stupak] amendment eliminates that yet critical requirement." (Statement of Rep. Schaefer.) (emphasis added).

> absolutely no business telling State and local governments how to price access to their local public right-of-way.[164]

Smart Communities has also shown in its comments in the Mobilitie docket that neither the terms of Section 253(c), the legislative history, or relevant case law require the fee charged by a local government for use of the public rights-of-way be restricted to the municipality's cost of maintaining the public rights-of-way. Nor does it require absolute parity among providers and utilities in setting compensation levels.[165] Indeed, obtaining fair market value for use of the public rights-of-way is by definition fair, and it is the normal measure of "just compensation" under the Fifth Amendment's Takings Clause. In this proceeding, as with the *Mobilitie* docket, the industry commenters appear to ask the Commission to regulate the costs that can be charged to it so that (1) it is not forced to bear the full costs associated with repeated applications, engineering, or land use reviews of its applications; and (2) it does not have to pay its fair share for the use of the public rights-of-way. This goes against one of Congress's principal purposes in adopting Section 253(c) – to ensure that Section 253 did not constitute an unfunded mandate and to prevent local governments from being required to subsidize telecommunications providers' costs.[166]

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[164] 141 Conf. Rec. H8460 (1995). Representative Stupak later added, "[W]e have heard a lot from the other side about gross revenues…. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue." 141 Cong. Rec. H8461 (daily ed. August 4, 1995)(Statement of Rep. Stupak).

[165] Smart Communities Mobilitie Docket Comments at 60.

[166] 141 Cong. Rec. H8460 (daily ed. August 4, 1995) (statement of Rep. Stupak) ("It is ironic that one of the first bills we passed in this House was to end unfunded Federal mandates. But this bill, with the management's amendment, mandates that local units of government make public property available to whoever wants it without a fair and reasonable compensation. The manager's amendment is a $100 billion mandate, an unfunded Federal mandate. Our amendment is supported by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures and the National Governors Association. The Senator from Texas on the Senate side has placed our language exactly as written in the Senate bill. Say no to unfunded mandates, say no to the idea that Washington knows best. Support the Stupak-Barton amendment.").

Recent decisions in state court are consistent with Smart Communities' arguments here that states may choose to limit the ability of their subdivisions to charge for use of public property where that is constitutionally permitted, but unless the state lawfully chooses to limit those charges, the right to recover rents is inherent in the ownership of the property, and as compensation for a grant to use property, and distinct from the ability to recover fees associated with regulatory programs.[167]

The Commission's practice of engaging in spectrum auctions serves as a useful analogy that supports Smart Communities' arguments that (1) compensation for use of the public rights-of-way should be priced at fair market value, (2) fair market value is fair and reasonable, and an efficient use of a finite government-owned resource. The history of the auctions as a means to achieve the fairest return for government is explained by the Commission:

> In 1993 Congress passed the Omnibus Budget Reconciliation Act, which gave the Commission authority to use competitive bidding to choose from among two or more mutually exclusive applications for an initial license. Prior to this historic legislation, the Commission mainly relied upon comparative hearings and lotteries to select a single licensee from a pool of mutually exclusive applicants for a license. The Commission has found that spectrum auctions more effectively assign licenses than either comparative hearings or lotteries. The auction approach is intended to award the licenses to those who will use them most effectively. Additionally, by using auctions, the Commission has reduced the average time from initial application to license grant to less than one year, and the public is now receiving the direct financial benefit from the award of licenses.[168]

The statement above falls in line nicely with recent remarks made by Chairman Pai on April 5,

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[167] For example, since 2006, Kentucky state law has prohibited local governments from collecting franchise fees on cable and communications services. In June 2017, the Supreme Court of Kentucky issued an opinion in *Kentucky CATV Association Inc. v. City of Florence et al.*, holding that the Kentucky Constitution delegates to cities "control over the placement of utilities within their public spaces and rights-of-way; and the right to reap the long-term profits of that control through consideration paid by private franchisees to the municipality, i.e., franchise fees." *Kentucky CATV Association, Inc. v. City of Florence et. al.*, 2017 Ky. LEXIS 277, *13 (2017).

[168] Federal Communications Commission, *About Auctions* (last accessed Jul. 17, 2017), *available at* http://wireless.fcc.gov/auctions/default.htm?job=about_auctions.

2017 regarding the importance of economic analysis at the Commission. In his remarks, Chairman Pai stated that "[s]pectrum license auctions are the most notable example of good economics guiding good policy at the Commission".[169] Pai also cited Ronald Coase's "seminal paper" in 1959 titled "The Federal Communications Commission" and his influence on the Commission eventual adoption of auctions for licensing spectrum.[170] In this paper, "Coase argued that the government should treat spectrum like other property, and allow markets to determine who gets to use it. As he put it, based on basic principles of economics, 'it is not clear why we should have to rely on the Federal Communications Commission rather than the ordinary pricing mechanism to determine whether a particular frequency should be used.'"[171]

Chairman Pai also noted that Coase's proposal was initially met with skepticism in the industry, Congress, and Commission but eventually "carried the day", and now, spectrum auctions "have facilitated the explosion of wireless services that have created millions of U.S. jobs and improved the American people's lives in countless ways."[172] In this proceeding, and in the *Mobilitie* docket, the industry and even the Commission appears to have a skeptical view on the current practices of local governments in obtaining the fair market value for use of the public rights-of-way. However, the current explosion in wireless services that Chairman Pai describes has happened because of, and not in spite of, such public rights-of-way practices. As Smart Communities has argued based on its own economic analysis and study, which is glaringly missing in comments by the industry, that such practices have facilitated, and will continue to

[169] "The Importance of Economic Analysis at the FCC", Remarks of FCC Chairman Ajit Pai at the Hudson Institute, April 5, 2017.

[170] *Id.*

[171] *Id.*

[172] *Id*.

facilitate, the innovation of new technologies and means of deployment and deployment in underserved areas, while preventing the exacerbation of marketplace inequities.[173]

Sprint also argues that the Commission should endorse the approach taken by states that have enacted legislation addressing access, fee levels, and time frames related to communications facilities in the public rights-of-way. First, as discussed elsewhere in this reply, the Commission has no authority to regulate the rates charged for public property. Second, any Commission action compelling local governments to provide access to the public rights-of-way and to limit compensation would create significant takings issues because the Supreme Court has clearly recognized a local government's "right to exact compensation" for such property uses, which Smart Communities explains in its comments. Third, the Commission's preemption of local discretion regarding how to charge for use of its property and of local rights-of-way practices would offend the Tenth Amendment and the Guarantee Clause of the Constitution discussed elsewhere in this filing.

R Street Institute alleges that in addition to "unreasonably high fees," local governments "often impose additional terms and conditions on broadband providers that discourage infrastructure deployment", including "extracting" what it alleges to be "unreasonable contributions" [174] As an example, R Street cites the City of Portland requiring companies like

[173] The spectrum example also exposes the limitation of the "monopoly" argument. Normally a monopoly argument arises in a situation where one market participant is using its power in an economically defined market to gain an advantage over competitors, and to prevent them from entering or remaining in the market in competition with it. The United States was clearly the sole controller of spectrum within the United States, and there is also almost no cost to the United States as a governmental entity of creating that spectrum, and its cost of management are far less than the value of that spectrum. However, it had no incentive to prohibit competition (and more than do localities), and the question raised by the spectrum auction example is: what is the best way to allocate access to a resource? What the auctions recognize is that if given away, or given away at cost, there is little incentive to use the resource efficiently and no guarantee that broad deployment will result.

[174] R Street Institute Comments at 8. *See also* Verizon Comments at 7. Verizon complains that the District has released a supplemental agreement for installing wireless facilities that , " would give the city the ability to require applicants to install, for free, WiFi access points (provided by the city) on the poles used by the applicant and to run fiber to each access point." Verizon makes no reference to whether such a proposal allows for offsets elsewhere.

Qwest and Time Warner Cable "to make in-kind contributions to support the city's effort to deploy and operate a competing broadband network."[175] On this point, R Street cites *Time Warner Telecom of Or. v. City of Portland*. What R Street fails to mention is that the Ninth Circuit held that these in-kind requirements "do not have the effect of prohibiting the provision of telecommunications services."[176] The Ninth Circuit affirmed the lower court's opinion, which agreed with the City of Portland's expert economist that the in-kind contributions were not "subsidies", as alleged by Qwest, because "[f]ranchisees provide in-kind contributions to the City in exchange for the valuable right to use the City's streets for telecommunications networks."[177]

Indeed, contrary to R Street's arguments there really is no correlation between right-of-way rents or in-kind contributions and broadband deployment. It is important to note here that R Street simply states examples of in-kind contributions but does not take the additional and necessary step of correlating those in-kind contributions with a decrease in deployment or an effective prohibition. Furthermore, R Street does not provide any economic analysis supporting its unfounded claims. On the other hand, Smart Communities has already shown in its analysis by economist Alan Pearce, Ph.D., that even with Portland's in-kind contribution requirements and fees for use of its rights-of-way, the city has a "relatively large number of competitive providers" when compared to other similarly situated cities that do not impose such right-of-way

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Nor does Verizon assert that it is being overcharged in any way. Without such allegations, the Commission lacks the authority to review. Still, one should not allow to stand the indirect accusation that requiring in-kind compensation is either illegal or counterproductive as reflected in the text above. In-kind payments are not inherently inappropriate, and in many cases better serve the financial needs of the applicant while meeting needs of the community.

[175] R Street Institute Comments at 8.

[176] *Time Warner Telecom of Or. v. City Of Portland*, 322 Fed. Appx. 496, *4-5 (9th Cir. 2009).

[177] *Time Warner Telecom of Or. v. City of Portland*, 452 F. Supp. 2d 1103, 1105 (D. Or. 2006) [citing *TCG New York, Inc. v. City of White Plains*, 305 F.2d 67, 80 (2d Cir. 2002) (cities "retain the flexibility to adopt mutually beneficial agreements for in-kind compensation").

compensation requirements.[178]

R Street also claims that "[w]hile municipal networks theoretically can provide additional competition and augment broadband deployment, their track record of doing so has been abysmal."[179] R Street's claims are without basis. First, municipal networks *actually* provide additional competition and augment broadband deployment. It is not theoretical, as Smart Communities explained in its comments.[180] Second, the track record has not been abysmal. In their comments, Smart Communities explained how the City of Portland's "Integrated Regional Network Enterprise" (IRNE) actually increased competitive alternatives by allowing customers to reach providers who do not have the resources to build out to the entire community.

b. *Undergrounding Requirements are Not An Effective Prohibition.*

T-Mobile and Verizon call on the Commission to declare and adopt rules stating that requirements that all wireless communications facilities be located underground constitute an effective prohibition of communications service.[181] T-Mobile cites to Mobilitie's filing in the Mobilitie docket, where it gives an example of a "California community" that requires all facilities to be located underground, "and thus does not allow even small cells attached to existing poles."[182]

First, the industry's argument that the Commission should use its Section 253 and Section 332 authority to take such action is incorrect. Section 253 does not apply at all here. Second, the claim underlying the application of Section 253 to wireless is that wireless and wireline should be treated identically. The complaint here is that wireless needs to be treated differently – the

[178] Smart Communities Wireline Comments at 27.

[179] R Street Institute Comments at 8.

[180] Smart Communities Wireline Comments at 24-27.

[181] Verizon Comments at 33; T-Mobile Comments at 38.

[182] T-Mobile Comments at 38.

two claims do not sit together. Third, the industry continues to present a misleading and incomplete picture on the reality of wireless facilities placement as it relates to undergrounding requirements. What is being complained about are requirements that structures in the public rights-of-way be placed underground. These requirements are often driven by safety considerations, as well as important economic development considerations, and often require local property owners or communities to invest millions of dollars to place utilities below ground.[183] Undergrounding programs could not possibly result in a *per se* effective prohibition under Section 253 or 332(c)(7) because though wireless services cannot operate underground, they can operate outside the public rights-of-way either on rooftops or in stealth configurations.[184] What are at issue legally in Sections 253 and 332(c)(7) are prohibitions and effective prohibitions, not hindrances, and in this case, no prohibition can be presumed.

c. *Moratoria Complained of by Industry are not Effective Prohibitions.*

The industry, including Verizon, T-Mobile, AT&T, and the Competitive Carriers Association, argue the Commission should use its Section 253 and 332(c)(7) authority to find that moratoria are effective prohibitions and to adopt rules that preempt moratoria.[185] Industry commenters cast a wide net when identifying so-called moratoria that are alleged effective prohibitions. These include public right-of-way management practices such as an Illinois city's five-year moratorium on pavement cuts to roadways that have been resurfaced or

[183] Smart Communities Comments at 71-75.

[184] This is also true in response to the example provided by the court in *Sprint Telephony PCS, L.P. v. County of San Diego* of an effective prohibition: "If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services." *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).

[185] Verizon Comments at 33; T-Mobile Comments at 36; AT&T Wireline Comments at 73; CCA Comments at 17.

reconstructed;[186] regulatory practices such as moratoria on approvals for substantial modifications or installations requiring a variance,[187] and moratoria on processing and approving small cell applications,[188] and proprietary decisions such as refusals to negotiate or consider access agreements for public rights-of-way or municipally owned structures in public rights-of-way.[189]

We have already explained that, to the extent it applies, the shot clock is clear for *wireless facilities* that moratoria have no effect. Beyond that, one cannot conclude that other moratoria can be addressed under either Section 332 (for wireless) or 253 (for wireline). To take an example: moratoria on street cuts are public right-of-way management tools that have three functions (a) they prevent damage to roadways that have just been restored, which is important to preserving the life of the roadway, and limiting its deterioration – an important consideration since a community can only physically restore a limited number of miles of roadway per year; (b) encourage placement when the roadway is open and before it is restored; and (c) prevent repeated disruption of pedestrian and vehicular traffic, and the costs attendant on that disruption. Because it is a management function within the meaning of Section 253(c), it does not matter if it is prohibitory or not – it is protected. And it is far from clear that it is prohibitory: a company that chooses to ignore a roadway opening is "prohibited" only in the sense that it made a choice (or may not have been ready) to enter the market when it could and now has to wait. That choice is the provider's own choice, and does not justify preemption.[190]

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[186] AT&T Wireline Comments at 74.

[187] T-Mobile Comments at 37.

[188] Verizon Comments at 6.

[189] *Id.* at 33.

[190] Indeed, the argument that delay equals a prohibition ignores the fact that delay is often a result of the actions of a provider, and not fairly attributable to a pre-emptible government law.

Equally off-base is the claim of the Critical Infrastructure Coalition that a state or local agency required pre-application process that effectively prevents an application from being filed should be seen as a de facto moratorium.[191] First, it is unclear what the standard would be for determining when a pre-application process effectively prevents an application from being filed, and the Critical Infrastructure Coalition does not cite a single example of such a pre-application process. Second, Smart Communities has argued that pre-application processes may actually speed up deployment by improving the quality and completeness of applications and facilitating faster local review. In the end, having the pre-application process count against the shot clock will actually dis-incentivize local governments from meeting and cooperating with companies, and given the significant number of delays caused by incomplete applications filed by the industry, adopting the industry's definition of moratorium may be more inefficient in the long run for deployment.

d. *Regulation of Facilities in the Public Rights-Of-Way Based on Aesthetics is not an Effective Prohibition.*

T-Mobile states that the Commission should declare that "local procedures affording a locality unfettered discretion as to whether to grant or deny an application— including unnamed or undefined discretionary factors like aesthetics that do not pertain directly to the management or use of the ROW" constitutes an effective prohibition.[192] The argument presumes – incorrectly that Section 253 applies to wireless placement. In fact, it simply underlines that as T-Mobile read Section 332, it means "nothing in this act restricts local authority over wireless placement, except those items listed below, and the additional restrictions the Commission chooses to impose." That argument is inconsistent with the Commission's own defense of its Section 332 regulations,

[191] CIC Comments at 20.

[192] T-Mobile Comments at 40.

which are based on the assumption that the *only* limits are those in Section 332, and that the Commission has authority to interpret those provisions, but not to add to them.

In any case, the arguments are not well-founded even under Section 253. As support, T-Mobile mentions a San Francisco ordinance that regulates telecommunications antennae near the public rights-of-way based on aesthetic concerns.[193] T-Mobile challenged this ordinance in court, but in its comments conveniently omit that the California Courts of Appeal upheld the ordinance, holding that the city's authority to regulate the installation of telecommunications equipment near public roads allows the city to consider whether the equipment would "diminish the City's beauty."[194]

In 2011, the city adopted an ordinance requiring a site-specific permit before the installation of certain telecommunications equipment on existing public rights-of-way.[195] In enacting the ordinance, the City Council recognized that "[t]he City's beauty is vital to the City's tourist industry and is an important reason for businesses to locate in the City and for residents to live [in the City]."[196] The ordinance was intended, in part, "to prevent telecommunications providers from installing wireless antennas and associated equipment in the City's public right-of-way either in manners or in locations that will diminish the City's beauty."[197]

Acknowledging the "tension" that sometimes "exists between technological advancement and community aesthetics,"[198] the court rejected the plaintiffs' claim that the public right-of-way

[193] T-Mobile Comments at 40.

[194] *T-Mobile West LLC v. City and County of San Francisco*, 3 Cal. App. 5th 334, 340 (2016).

[195] *Id.* at 340-342.

[196] *Id.* at 340.

[197] *Id.*

[198] *Id.* at 330.

is inconvenienced only by physical obstruction of travel.[199] Citing *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009), the court explained that public use of the road encompasses "far more than getting from place to place," and may include "social, expressive and aesthetic functions." Rejecting the plaintiffs' claims of preemption, the court explained that state law does not give telephone corporations unlimited rights to install their equipment in the public right-of-way.[200] Rather, state law reserves to local government the police power to regulate against inconvenience of public use, a power that is "broad enough to allow discretionary aesthetics-based regulation."[201]

T-Mobile makes no argument as to why such regulation is "unfettered" and simple states that "aesthetics" is an "unnamed or undefined discretionary factor[ ] that does not "pertain directly to the management or use of the ROW" — a claim the court rightly and flatly rejected.[202] In a footnote later on, T-Mobile stated that the San Francisco ordinance "requires compliance with aesthetics-based compatibility standards, determined solely by the location of the facility."[203] Thus, T-Mobile recognizes that there are certain standards that the city must use when regulating wireless facilities based on aesthetics, and as the California appellate court has stated, such aesthetic-based compatibility standards pertain directly to management and use of the public rights-of-way.[204]

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[199] *Id.* at 355-356.

[200] *Id.* at 348-349.

[201] *Id.* at 346-347.

[202] T-Mobile Comments at 39.

[203] T-Mobile Comments at 40, FN 173.

[204] The cases cited do not involve a consideration of the scope of Section 253 or 332, but instead relate to California law provisions governing the use of the rights of way by wireless providers. In California, wireless providers obtain access to the rights of way under the same provisions that apply to wireline providers. The holding on aesthetics is thus not based on a distinction between wireline and wireless per se, but on a determination that management of the right of way often involves aesthetic considerations (as should be obvious where some undergrounding projects are concerned).

AT&T also claims that local governments have "enacted unreasonable aesthetic restrictions" that "can" have the effect of prohibiting "wireless small cell facilities".[205] Without naming any municipalities, AT&T lists several examples of "local governments" in different states that supposedly violate Section 253 and 332, alleging that such ordinances and local laws are "problematic because they are vague and often applied discriminatorily."[206] AT&T's examples include requirements for stealth designs and prohibitions on siting in and around historic properties and districts.[207] Aside from the fact that AT&T fails to name such local governments or to give them an opportunity to respond, AT&T fails to take into account that its list consists of examples that may be hindrances or added costs of doing business but are not effective prohibitions. Indeed, AT&T even says that "[a]s a practical matter, service providers must incur the added expense of conforming their equipment designs to the approved size and configuration …"[208] An added cost to conform to certain size and configuration standards or to paint facilities a color that blends with the surroundings is not an effective prohibition, and there is no economic analysis provided by AT&T or other industry commenters suggesting that such requirements are cost prohibitive under either Section 332 or (even if it applied) Section 253.

e. *Commenters Seeking Caps On Permit Fees Are Misguided; Cost-Based Fees Should Vary*

Cost-based fees, by their very nature, will be different in different communities and if anything, typically under-recover actual costs. Industry calls for seeking caps on permit fees are misguided. Pole owners understand this concept.[209] So does Chairman Pai.[210]

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[205] AT&T Wireless Comments at 16.

[206] *Id.* at 17.

[207] *Id.*

[208] *Id.* at 16-17.

[209] AT&T opposes a requirement for uniform make-ready costs as impractical and not recognizing that each make-ready is distinct.

Permit fees are based on costs. Not surprisingly, the frequency and detail with which costs are analyzed and fees set depends on the size and resources available to a community, as well as state or local requirements. But, there is certainly no reason to believe that the industry is being charged unreasonable fees, or that federal action would be appropriate or permissible. In our Mobilitie Reply Comments as well as in our opening comments in the Wireless Infrastructure proceeding we provided thumbnails as to the way a number Smart Communities such as Ann Arbor and Cary, North Carolina set fees based upon annual use levels and budgetary insights, not by whim.[211]

Atlanta, Georgia, a Smart Communities member, was praised by some in the *Mobilitie* docket (s*ee. e.g.* ,Mobilitie[212]) as a model city for deploying small cell wireless technology. On the other hand, Crown Castle criticized Atlanta in the *Mobilitie* docket for an overly expensive fee ordinance that it has yet to pass,.[213] Atlanta explained to the Commission as part of the Smart Communities' Reply Comments in Mobilitie[214] and in an April 5, 2017[215] letter to the Commission that:

[Atlanta]Committee, is considering an ordinance that would establish reasonable fees for wireless pole attachments in the City's public right-of-way. Before moving the legislative

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[210] Dissenting Statement of Commissioner Ajit Pai, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (2015).

[211] Smart Communities Reply Comments [WT Docket No. 16-421] (filed April 7, 2017) at pg 50-51.

[212] Don Bishop, Seeing *Wireless Service as Essential Speaks to the Future of Wireless Infrastructure,* AGL Magazine (March 2017) at p. 36 available at http://cdn.coverstand.com/39675/389411/213ff655b3e370bf9735aed1e62d36199b03bc91.3.pdf ("Jabara Interview").

[213] Crown Castle Mobilite Comments at p.12 – The City of Atlanta files as part of these Reply Comments as Exhibit 1 a Letter from William Johnson, City of Atlanta, dated April 5, 2017 to Chairman Pai and Commissioners Clyburn and O'Rielly ("Atlanta Letter") that provides a different story. ("The City of Atlanta, specifically the City's Utilities.

[214] Smart Communities Reply Comments in Mobilitie docket at p. 10.

[215] Letter from William Johnson, City of Atlanta, dated April 5, 2017 to Chairman Pai and Commissioners Clyburn and O'Rielly

proposal out of Committee, the City invited the Georgia Wireless Association ("GWA") to engage in discussions about the proposed ordinance. As a GWA member, Crown Castle has participated in three meetings at City Hall during a five week period, with a fourth meeting scheduled to occur in two weeks. The meetings were hosted by City officials from the Mayor's Office and the Department of Public Works, and attended by approximately 20 industry representatives from GWA. In response to industry's input, including that of Crown Castle, during the first three meetings, the City substantially restructured the proposed ordinance. None of this information, however, was included in Crown Castle's description of the City's ordinance that was shared with the Commission."[216]

In this docket, while Crown Castle appears to recognize that its claims against Atlanta were wrong, and does not repeat those allegations, others have, citing to Crown's Mobilitie Comments.[217] We call this incident to the Commissions attention to not only clarify for the record Atlanta's exemplary outreach to the industry in establishing its pricing, but also to point out the echo chamber of complaint and the lack of credibility many of these complaints possess.

Crown Castle did malign Smart Communities member Gaithersburg for considering a master right-of-way use and franchise agreement that would impose a non-refundable application fee of $500 for each new pole or collocation, an annual attachment fee of $500 for each facility on which equipment has been installed, and a use fee of five percent (5%) of gross revenues.[218] Much like its allegations against Atlanta in the Mobilitie docket, Crown Castle fails to mention that the City of Gaithersburg provided a 30 day comment period on the franchise agreement and fees, of which Crown took advantage. Crown offered comments on the right of way and

[216] *Id.*

[217] T-Mobile Comments at 7.

[218] Crown Castle Comments in Wireless Docket (17-79) (Filed June 15, 2017) at 12

franchise agreement which are reflected in the final draft, but Crown Castle was silent as to the fees associated with the agreement. Their silence at the local level may be attributed to the fees being modeled upon agreement that the Gaithersburg City attorney's office was able to find between Crown Castel and other Maryland jurisdictions. Why Crown fails to share these additional insights with the Commission is troubling. Such additional information would paint a fuller picture of how painstaking local government are in establishing ordinances, and permit pricing levels. This should cause the Commission to pause when relying upon allegations from Crown as to improper pricing

Finally, a third member of Smart Communities that is maligned by Crown Castle regarding the costs of permit fees is Smart Community member Montgomery County, Maryland. Montgomery County is a member of Smart Communities, but also filed Supplemental Comments and Reply Comments in the *Mobilitie* docket,[219] in which the County documented that any claims of delay or excessive fees made against the County are dwarfed by its record of success, including:

- The County has reviewed 2,900 applications in 20 years, and currently has 1,121 wireless facilities deployed at 534 unique locations throughout the County;
- The County Department of Permitting Services processes over 60,000 permits and conducts more than 157,000 inspections annually.[220]

Moreover, the costs of processing applications in Montgomery County are set based upon

[219] Supplemental Comments of Montgomery County, MD (filed Mar. 8, 2017) ("Montgomery County Mobilitie Comments"). Supplemental Reply Comments of Montgomery County, MD (filed April 7, 2017) (Montgomery County Mobilitie Reply Comments.)

[220] Montgomery *Id.* at i.

research, and for which there is a publically available audit,[221] and subject to the annual budgeting process in which carriers are welcomed to participate. In fact, a close review of the costs of addressing applications in Montgomery County versus the fees collected for these services reveals a loss as the costs of outside technical assistance is covered, but many time county administrative staff's time is not.

f. *The Commission Cannot Regulate Municipal Poles Under the Guise of an Effective Prohibition*

NCTA argues that Section 253 can be used to regulate municipal poles despite the clear language of Section 224 on the basis of an unsubstantiated claim of local government "abuse of monopoly power".[222] CTIA argues that municipal poles are not excluded from the Commission's authority under Section 253.[223] As we noted earlier in Section V, the industry cannot make an effective prohibition claim with respect to access to municipal poles unless municipal poles somehow get captured by Section 253, and the only way this can happen is if the proprietary interests of localities in poles or similar infrastructure are ignored, which it cannot be. As importantly, the idea that the careful limitations struck in Section 224 were overturned by Section 253 do not stand up to scrutiny. Section 224 was amended and broadened in Section 703 of the TCA. Had Congress intended to eliminate the exemption for municipal infrastructure, it would have done so there. It did not. Nor can section 253 serve as a substitute for Section 224. Section 253, by its terms, allows for preemption of a law, regulation or legal requirement. What industry wants is not preemption, but grant of an affirmative right that does not exist (the right to attach); and it seeks that right at a rate prescribed by the Commission. But because the

[221] The Department of Permitting Services fee audit is at FN 17 https://permittingservices.montgomerycountymd.gov/DPS/pdf/DPSFeeFinalReport2015.pdf.

[222] NCTA 42-44

[223] CTIA Comments at 13.

Commission is limited by Section 253 to preemption; and lacks the authority to either grant rights or provide access under Section 224, the relief sought is beyond the authority of the Commission to provide.

g. *The Commission Cannot Preempt State Franchise Fees or Regulations Applicable to Cable Operators Under the Guise of an Effective Prohibition*

NCTA urges the Commission, under Section 253 and 541, to "prohibit local governments from imposing fees for broadband or telecommunications services offered by cable operators that place no additional burden on the public right-of-way.[224] NCTA argues that where a cable operator already pays a cable franchise fee for use of the public rights-of-way, the addition of broadband and telecommunications services does not impose an additional burden on the public rights-of-way and should not be treated by local governments as a "revenue-generating opportunity."[225] Essentially, NCTA argues that cable operators should be treated differently because they already pay a cable franchise fee for use of the public rights-of-way, and so somehow because they are doing that, it would be an effective prohibition on telecommunications services to charge them more if there is no added burden on the public rights-of-way.

NCTA urges the Commission to adopt a position that has already been proven in court to be untenable and one that goes against the plain language in the Cable Act. In the *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Ore. 528 (2016), the Supreme Court of Oregon correctly held that a license fee imposed by the City of Eugene on Comcast for use of the public rights-of-way to provide telecommunications service was not a franchise fee barred by the Cable Act. Looking to the plain language of the Cable Act, the court held that it was not a franchise fee because it

[224] Comments of NCTA, WC Docket No. 17-84, at 23-24 (Jun. 15, 2017).

[225] *Id.*

was not imposed on Comcast *solely* because of its status as a cable operator. The court stated the following:

> The problem with Comcast's argument…is that it fails to account for the phrase "solely because of" in 47 USC § 542(g)(1). Comcast argues only that the license fee is imposed on it for activity it performs as a cable operator. At most, that argument establishes that Comcast is a cable operator and that some applications of the license fee reach cable operators. But the statute requires more. Not all fees imposed on a cable operator are franchise fees. Instead, a fee is a franchise fee if it is imposed on a cable operator solely because of its status as a cable operator. Whether the fee is imposed on a cable operator is a different question from whether the fee is imposed solely because of a company's status as a cable operator.
>
> Comcast errs by focusing on its status as a cable operator rather than focusing on the scope of the license fee. The phrase "solely because of" is used to identify the reason that the fee is imposed on one company rather than another. *See Webster's* at 2168 (defining "solely" as "to the exclusion of alternate or competing things (such as persons, purposes, duties) done solely for money a privilege granted solely to him rely solely on oneself"); *id.* at 194 (defining "because of" as "by reason of : on account of"). A fee is a franchise fee if it is imposed on a company because it is a cable operator and not for any other reason.
>
> The city's license fee does not meet that standard. The license fee is imposed on Comcast because it provides telecommunications services over the city's public rights of way. The relationship between that reason and Comcast's status as a cable operator is only incidental. Although one type of company that may provide telecommunications services is a cable operator, cable operators do not necessarily provide telecommunications services and non-cable operators may provide telecommunications services. Whether a company is a cable operator is therefore neither necessary nor sufficient to trigger the license-fee requirement.[226]

Thus, the issue here is not whether the additional broadband and telecommunications service adds a burden on the public rights-of-way (although it may in fact do so, since facilities not required for cable may be installed in connection with the provision of non-cable services). The Cable Act chooses to limit what may be charged for cable service, but by its terms does not pretend that this is intended as compensation for *all* uses of the right of way. Rather, the

[226] *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Ore. 528, 557-558 (2016)

franchise fee provision is written to permit a specified fee for cable service, and to permit other non-discriminatory fees for other services as part of the fees for use of the rights of way – as long as the fees are non-discriminator.

h. *Additional Local Practices Mentioned by Industry are not Effective Prohibitions*

Industry commenters to make several declarations that certain alleged practices by local governments constitute effective prohibitions. Verizon asks the Commission to use its Sections 253 and 332 authority to find that conditions on the provision of wireless service – such as "excessive separation requirements between facilities, overly restrictive equipment size limits, and unreasonable set-back requirements from residential properties – would similarly strain a carrier's ability to provide service" and are therefore preempted.[227] Mobilitie also states that minimum distance requirements prohibiting new poles are effective prohibitions under Section 253.[228]

T-Mobile asks the Commission to declare that "onerous" application processes that impose "burdensome requirements on applicants is an effective prohibition", which would include submitting information or undergoing a review process that does not have anything to do with management or use of the public rights-of-way, submitting corporate policies, documentation of licenses, and other information unnecessary to meet objective public safety and welfare standards.[229]

AT&T also wants the Commission to declare limitations on competitors, prohibiting batched applications, and burdensome permitting requirements all to be effective prohibitions

[227] Verizon Comments at 13.

[228] Mobilitie Comments at 8.

[229] T-Mobile Comments at 38-39.

under Section 253.[230] Similarly, Verizon also argues that burdensome permitting requirements are effective prohibitions because they impose unnecessary and unreasonable delays in the permitting process.[231]

The issue of whether a delay in processing an application is an effective prohibition has been litigated in courts. Courts, however, have found that an extensive delay can constitute an effective prohibition, but only in combination with other factors such as a city's discretionary authority to reject a franchise on *any* public interest factor.[232] At the outset, Smart Communities has shown in its comments that delays in deployment are most often attributable to incomplete applications.[233] Moreover, what industry commenters often allege to be burdensome permitting requirements are in reality detailed application requirements that local governments use to fully and promptly evaluate the merits of an application, knowing the unique needs of the particular community at issue. The court in *Sprint Telephony PCS, Ltd. P'ship v. Cty. of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008) found the same.[234]

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[230] AT&T Wireless Comments at 3, 21-22.

[231] Verizon Comments at 12.

[232] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002).

[233] Smart Communities Wireless Comments at 17-24.

[234] The court stated the following:

> "Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board could exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance--the provision of wireless services and other valid public goals such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that "no set of circumstances exists under which the [Ordinance] would be valid," Salerno, 481 U.S. at 745, simply because the zoning board exercises some discretion.
>
> The same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements stall applications and thus effectively prohibit the provision of wireless

It is notable that most of these arguments depend on the incorrect assumption that Section 253 applies to wireless siting decisions. It does not, and it is not seriously argued that the applications are inconsistent with Section 332(c)(7). As Smart Communities explained in Section V.D, there is no evidence to support any conclusion that such categories of practices, described without ambiguity and without any context, arise to the level of effective prohibitions in any way, shape or form. Nor, as we have discussed in Section II.D, is there any legal basis for taking action on these complaints. Moreover, some simply ignore the fact that Section 253 is itself limited to requirements that prohibit the ability of an entity to provide telecommunications services. Traditionally, access to rights of way to install permanent facilities has been limited to governmental agencies and utilities – entities that perform public functions and have obligations to serve the public. The argument, for example, that one cannot require licenses is actually an argument that Section 253 allows anyone to access the right of way for any purpose. It does not. The Commission should reject these complaints outright.

5. The Record Does Not Support Establishing Shot Clocks Or Deemed Granted Remedies For Franchise Applications.

Several commenters ask the Commission to expand its use of shot clocks, currently limited to some wireless siting and cable franchise matters, to all instances where permitting is required.[235] Commenters also ask the Commission to use its authority to extend deemed granted remedies to all types of deployments. As we have noted repeatedly, Section 253 has no bearing

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services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. See 47 U.S.C. § 332(c)(7)(B)(ii) & (v)." *Sprint Telephony PCS, Ltd. P'ship v. Cty. of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008).

[235] Conterra-Southern Light-Uniti Comments at 17-20.

on wireless applications. However, it would not support applications of "shot clocks" even with respect to applications for other facilities. As discussed at length by Smart Communities in initial comments[236] and in these reply comments, Section 253 does not support general rulemaking of this type, and does not permit any Commission action absent a finding that a particular practice "prohibit[s] or [has] the effect of prohibiting" the ability to deploy telecommunications services.[237] Section 253 sets high bars, both procedurally and substantively, which must be cleared before Commission action could proceed, including Section 253(d)'s requirements of notice and opportunity to comment on the proposed preemption of a particular "statute, regulation, or legal requirement" alleged to violate Section 253(a) or (b).[238]

Commenters seeking expansive shot clocks and deemed granted remedies offer no evidence to support such a finding, however. In a joint filing, Conterra, Southern Light, and Uniti Group claim that "local franchising processes that exceed 120 days" meet the requirements of Section 253(a), but offer absolutely no evidence to support this assertion.[239] Commenters repeatedly argue that any process which results in "delay" amounts to a prohibition, and that delays amount to "effectively preventing the provision of telecommunications service."[240] Smart Communities agree that pace of deployment is an important consideration – no community is opposed to the idea of broadband deployment. All evidence suggests that deployment is proceeding apace, however, and nowhere in the joint Conterra-Southern Light-Uniti filing is any example offered of an instance where delays resulted in failure, ultimately, to deploy service.

[236] Smart Communities Wireline Comments at 6-11, 21.

[237] 47 U.S.C. §253(a).

[238] 47 U.S.C. §253d.

[239] Southern Light Conterra Uniti at 18.

[240] *Id.* At 20

Section 253 is unambiguous on this point – only policies which prohibit, or have the effect of prohibiting, deployment, are subject to preemption under that section.

The same flaws appear in commenters' requests that the Commission implement deemed-granted remedies to kick in at the conclusion of any shot clocks. Commenters again fail to offer any substantiation to support their assertion that deemed-granted remedies are necessary to remedy practices which in fact, not merely in rhetoric, prohibit the deployment of services. And they fail to point to any substantive right the Commission is provided to grant access to any municipal property, including rights of way, under Section 253.

Finally, commenters fail to recognize that, as Smart Communities wrote in initial comments, "Section 253 entails a very different framework with a limited role assigned to the Commission. Thus, the Commission has no authority to adopt a shot clock or other time limit."[241] Smart Communities' initial analysis remains valid, and nothing in the record proffered in support of expansive Section 253-based shot clocks provides any legally sustainable alternative interpretation.

F. Wireless Industry Claims Of Unreasonable Discrimination Are Unfounded.

T-Mobile and Sprint argue the Commission should clarify that terms and access made available to any telecommunications provider must be available to all on the same terms and conditions.[242] In particular, T-Mobile argues that the Commission must make clear that the wireline industry cannot be subject to "more favorable" access to the public rights-of-way compared to the wireless industry.[243]

[241] Smart Communities Wireline Comments at 22.

[242] T-Mobile Comments at 45; Sprint Comments at 43.

[243] T-Mobile Comments at 46.

First, as we have explained earlier, the wireless industry cannot avail itself of Section 253 because that statute does not apply to wireless service. Even if it did, by arguing that undergrounding requirements, for example, do not apply to them when such requirements are imposed on the wireline industry, the wireless industry is making a self-refuting argument because it is essentially asking to be treated like the wireline industry except when they want to be treated differently. In essence they are acknowledging that asymmetric treatment does not violate Section 253, and that, in fact, there are significant differences between traditional wireline facilities and wireless facilities.[244]

Second, as Smart Communities noted in its comments, given that Section 253 does not apply to wireless deployments. Tthe only non-discrimination provision that applies to wireless appears in Section 332(c)(7)(B)(i)(I), 332(c)(7) which and prohibits state and locals governments from refers to unreasonably discriminating among providers of functionally equivalent services. Courts and the legislative history make clear that for the limited purpose of applying Section 332(c)(7)(B)(i)(I), wireless and wireline services cannot be considered "functionally equivalent."

T-Mobile's position has no support in either legislative history or case law. The House Conference Report states that the term "functionally equivalent services" refers "only to personal wireless services that directly compete against one another" or as interpreted by the 7th Circuit, "… the statute requires the decision maker to see if the two services (or products) are direct substitutes for one another and thus are in direct competition with one another." While wireless and wireline services may both provide voice, they are hardly direct substitutes. The Second Circuit added further clarification to the House Report and 7th Circuit when it explained:

[244] The Commission's interpretation of Section 6409 illustrates the point. It does not limit wireless to using utility poles at a heigh consistent with those elsewhere in the rights of way – it permits an expansion of one-quarter to one half of a pole's height. It does not limit the size or location of attachments to those typical on a utility pole. If a facility is not subject to concealment elements, six foot appurtenances can be added to the sides of the poles, in configurations that far exceed what is traditionally permitted in the rights of way.

Sprint's ability to compete with land-line based services simply is not part of the inquiry under subsection B [of Section 332(c)(7)]. Subsection B(i)(I) speaks only to Sprint's ability to compete with "functionally equivalent services," which does not include land-line services. See H.R. Conf. Rep. No. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. at 222 ("When utilizing the term 'functionally equivalent services' the conferees are referring only to personal wireless services that directly compete against one another."). Because subsection B(i)(II) only considers whether a town's decision will have the effect of prohibiting personal wireless services in a given area, Sprint's reliance on that subsection to contend that it cannot be prohibited from competing effectively with land-line systems is misplaced.

Indeed, neither Section 253 nor Section 332(c)(7) require local governments to treat different types of telephone or personal wireless companies identically.[245] The concern in Section 253(c)'s safe harbor is on a competitively neutral and nondiscriminatory basis between telecommunications competitors, not between telecommunications providers and others.[246] Even if Section 253(c)'s safe harbor is applicable to "asymmetric treatment" between telecommunications and non-telecommunications providers, Section 253(c)'s safe harbor is applicable unless there is a significant imbalance; and if the difference in treatment is not justified.

[245] What wireless providers are seeking really is quite different. Smart Communities really have traditionally approved only wires, running along the roadway, where facilities are allowed aboveground; and only as a secondary use. Traditionally, headend, central offices and the other operating elements have been placed off the public rights-of-way. Here, wireless providers are placing many of those permanent facilities in the public rights-of-way, in ways that require much larger deployments. It is not discrimination to treat such different facilities differently, and to focus on their impacts.

[246] Smart Communities Wireless Comments at 70-71.

VI. CONCLUSIONS

For the reasons discussed above, and in the expert declarations and reports, the Commission should not adopt additional rules or shot clocks directed at local governments; nor should it continue to pursue the topics raised in the Notices of Inquiry.

Respectfully submitted,

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July 17, 2017

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